1894

# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894

No. 77

HENRY M. JONES, HERBERT PAYSON HOWARD WIL-
LOW, ET AL., PLAINTIFFS IN ERROR,

vs.

THE CITY OF PORTLAND.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF
MAINE.

FILED SEPTEMBER 4, 1894.

(16,000)

(25,068)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1916.**

## No. 336.

HENRY M. JONES, HERBERT PAYSON, HOWARD WINSLOW, ET AL., PLAINTIFFS IN ERROR,

*vs.*

THE CITY OF PORTLAND.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

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STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et al.
vs.
CITY OF PORTLAND.

*Bill of Complaint.*

To the Supreme Judicial Court, In Equity:

Henry M. Jones, Herbert Payson, Howard Winslow, John W. Sulliver, William Leavitt, Franklin H. Morse, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, all of Portland in said County of Cumberland and complain against the City of Portland, a body politic and corporate located in said County of Cumberland, and say:

1. Each of the plaintiffs herein at all times since January 1, 1912, and for many years prior thereto has been and now is a citizen, resident and taxable inhabitant of said city of Portland, a citizen and resident of the State of Maine and a person within its jurisdiction, a person born in the United States and subject to the jurisdiction thereof, and a citizen of the United States of America. Each of the plaintiffs herein now owns and for more than two years last past has owned real estate situated in said City of Portland, upon which said real estate he has been and now is assessed by said city for purposes of taxation *upon which said real estate he has been and now is assessed by said city for purposes of taxation* upon a valuation of more than one thousand dollars and has paid to said city taxes duly assessed upon said real estate, and is now liable to pay taxes upon such assessment on said real estate, and within one year prior to the filing of this bill has paid to said city taxes assessed on said real estate.

2 The defendant, said City of Portland, is a body politic and corporate located in said County of Cumberland and State of Maine.

3. Section 87 of chapter 4 of the Revised Statutes of Maine provides that any city or town may establish and maintain, within its limits a permanent wood, coal and fuel yard, for the purpose of selling at cost, wood, coal and fuel to its inhabitants; and further provides that the term "at cost" as used therein, shall be construed as meaning without financial profit. Said section 87 was enacted in the year 1903, and was approved March 19, 1903 and has not since been repealed or amended.

4. In February, A. D. 1913, to wit, on February 4, 1913, said City of Portland voted that it establish and maintain within its

limitations a permanent coal and fuel yard for the purposes of selling at cost wood, coal and fuel to its inhabitants and that the money necessary for such purpose be raised by taxation, and that the term "at cost" as used in said vote should be construed as meaning without financial profit. On February 3, 1913, the common council of said city at a legal meeting thereof passed said vote: on February 3, 1913, the board of aldermen of said city at a legal meeting thereof passed said vote; and on February 4, 1913, Oakley C. Curtis, the then duly elected, qualified and acting mayor of said city, approved said vote; whereupon said vote became the vote of said city.

5. In February, 1913, to wit, on February 4, 1913, said City voted to appropriate the sum of one thousand (1,000) dollars to be devoted towards carrying out the purposes of said vote set forth in the fourth paragraph hereof. On February 3, 1913, the common council of said City at a legal meeting thereof passed said vote to appropriate; on February 3, 1913 the board of aldermen of said city at a legal meeting thereof passed said vote to appropriate; and on February 4, 1913, Oakley C. Curtis, the then duly elected, qualified and acting mayor of said city, approved said vote to appropriate; whereupon said vote to appropriate became the vote of said city.

6. The plaintiffs are informed and believe and therefore
3 allege that it is the intention of said city to do all and singular the several acts contemplated by said votes for the purpose therein set forth, including the establishment and maintenance of said wood, coal and fuel yard in accordance with the said votes, and including the expenditure of large sums of money.

7. Such establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants is not a public use; the money necessary for the establishment of said yard by said city must be raised by taxation of the taxable inhabitants of said city; the plaintiffs herein are certain of such taxable inhabitants; such taxation for a use not public will deprive the plaintiffs of property without due process of law, and is therefore in violation of the provisions of section one of the Fourteenth article of Amendments to the Constitution of the United States which provides that no state shall deprive any person of property without due process of law; such taxation by said city by virtue of said Statute of March 19, 1903, is a deprivation by said city of the property of the plaintiffs without due process of law, and is therefore in violation o fthe provisions of section one of the Fourteenth article of Amendments to the Constitution of the United States which provides that no state shall deprive any person of property without due process of law; said statute of March 19, 1903 is a law made and enforced by the State of Maine abridging the privileges and immunities of the plaintiffs herein as citizens of the United States and is therefore a law in violation of the provisions of section one of the Fourteenth article of Amendments to the Constitution of the United States which provides that no state shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; said votes and any action taken by virtue of said votes or either thereof or by virtue of said statute of March 19, 1903 are each illegal in that thereby the plaintiffs will be deprived of property without due process of law and therefore are each in violation of the provisions of section one of the Fourteenth article of
4 Amendments to the Constitution of the United States which provides that no state shall deprive any person of property without due process of law; whereby the plaintiffs will suffer immediate, substantial and irreparable injury which cannot be adequately remedied at law, and the prosecution of actions at law for the enforcement of the rights of the plaintiffs and for the protection of their property will impose upon the plaintiffs vexatious and oppressive litigation and a multiplicity of suits. There is drawn in question by this bill of complaint the validity of said statute of March 19, 1903 and the authority exercised under the State of Maine by said City in accordance with said votes of said city, each on the ground of its being repugnant to said section one of the Fourteenth article of Amendments to the Constitution of the United States as hereinbefore set forth. The plaintiffs specially set up and claim under said section one of the Fourteenth article of Amendments to the Constitution of the United States their rights, privileges and immunities as citizens of the United States as herein in this bill set forth and included, and none other.

8. Clause eleven of section six of chapter 79 of the Revised Statutes of the State of Maine provides that when cities for a purpose not authorized by law vote to pledge their credit or to raise money by taxation or to exempt property therefrom or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purpose, the Supreme Judicial Court shall have jurisdiction in equity on petition or application of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint. Said city has by its said votes set forth in the fourth and fifth paragraphs of this bill for the purpose set forth in said votes voted to raise money by taxation and, to pay money from its treasury, which said purpose is a purpose not authorized by law. The plaintiffs herein are taxable inhabitants of said city and are more than ten in number.

5 Wherefore, the plaintiffs pray:

1. That the said defendant, said City of Portland, its officers, agents, attorneys, servants and employees, may be restrained and enjoined from establishing or maintaining within its limitations a permanent coal and fuel yard for the purposes of selling at cost wood, coal and fuel to its inhabitants, the term "at cost" as used herein being construed as meaning without financial profit, and from raising by taxation the money necessary for such purpose, and from paying out any money or doing any act or thing in furtherance of either of said votes or tending to carry the same into effect.

2. That this Court decree that each of said votes and said statute of March 19, 1903, are each in violation of section one of the Fourteenth article of Amendments to the Constitution of the United

States as hereinbefore set forth and therefore unconstitutional and void.

That pending the final determination of this suit this court will issue its order restraining and enjoining said defendant, said City of Portland, its officers, agents, attorneys, servants and employees, from establishing or maintaining within its limitations such permanent coal and fuel yard for the purposes of selling at cost wood, coal and fuel to its inhabitants, the term "at cost" as used herein being construed as meaning without financial profit, and from raising by taxation the money necessary for such purpose, and from paying out any money or doing any act or thing in furtherance of either of said votes or tending to carry the same into effect.

4. That the plaintiffs may have such other and further relief as equity may require.

5. And may it please this Honorable Court to grant its writ of injunction directed against said defendant, said City of Portland, its officers, agents, attorneys, servants and employees, restraining and enjoining them and each of them as hereinbefore prayed; and also to issue its writ of subpoena to the said defendant commanding it to appear before this court and answer to this bill of complaint at June Rules next and to abide the orders and decrees of this court thereon.

6 Dated at said Portland, this first day of May, A. D. 1914.

CHAS. F. MOUNTFORT,
JAMES T. JACK,
JOHN W. GULLIVER,
HERBERT PAYSON,
HARRY H. PEASE,
HOWARD WINSLOW,
CHAS. F. GUPTILL,
WILLIAM LEAVITT,
HENRY M. JONES,
JOHN E. SHEARMAN,
CARL A. WEBER,
FRANKLIN H. MORSE,
HENRY S. PAYSON,
GEORGE M. BLAKE,
ROBERT D. LIBBY.

EBEN WINTHROP FREEMAN
*Solicitor for Plaintiffs.*

STATE OF MAINE,
*Cumberland, ss.*

Then personally appeared the above named George M. Blake and made oath that he has read the above bill and knows the contents thereof, and that the same is true of his own knowledge, except the matters therein stated to be on information and belief, and that as to those matters he believes them to be true.

Before me,

EBEN WINTHROP FREEMAN,
*Justice of the Peace.*

A true copy.
Attest:
[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

7 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES, ET ALS
v.
CITY OF PORTLAND.

*Demurrer.*

To the Supreme Judicial Court, in Equity:

The demurrer of the City of Portland, the defendant herein, to the Bill of Complaint of Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Franklin H. Morse, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort.

The defendant demurs to the plaintiffs' bill and for cause of demurrer shows:

That the plaintiffs have not in and by their said bill made or stated such a case as entitled them or either of them in a Court of Equity, to any discovery or relief against the defendant as to the matters contained in said bill, or any of such matters.

Wherefore, the defendant demurs thereto and demands the judgment of this Court whether it shall be compelled to make any further or other answer to said Bill, and prays to be hence dismissed with its costs and charges in this behalf wrongfully sustained.

CARROL S. CHAPLIN,
*Solicitor for Defendant.*

I certify that this demurrer is filed in good faith, and is not intended for delay.

CARROL S. CHAPLIN.

And the plaintiffs say that their Bill of Complaint is sufficient in law.

Wherefore they pray judgment.

By EBEN WINTHROP FREEMAN,
*Solicitor for Plaintiffs.*

8 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES ET AL.
v.
CITY OF PORTLAND.

*Report.*

Upon a hearing in the above entitled cause, the Justice hearing the same is of the opinion that questions of law are involved, of sufficient importance and doubt to justify the same, and, the parties agreeing thereto, hereby reports this cause to the next term of the Law Court to be held at Portland.

The bill of complaint and the demurrer thereto to make the report of said cause.

GEORGE F. HALEY,
*Justice, Supreme Judicial Court.*

Agreed to.
EBEN WINTHROP FREEMAN,
*Solicitor for Plaintiffs.*
CARROLL S. CHAPLIN,
*Solicitor for Defendant.*

A true copy of the demurrer and of the report.

Attest:
[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

9 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als., Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Opinion.*

"HALEY, *J.*:

This is a bill in equity, praying for an injunction against the City of Portland, restraining and enjoining the city from establishing a permanent municipal fuel yard, brought by the plaintiffs, taxable

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inhabitants of said city, under the provisions of R. S., Chap. 79, Par. VI, Cl. 11, which authorizes this court to restrain and enjoin, upon petition or application of not less than ten taxable inhabitants of counties, cities, school districts, villages or other public corporations who, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation, or to exempt property therefrom, or to pay money from their treasury, or if any of their officers or agents attempt to pay out money for such purpose.

The bill sets forth Sec. 87, Chap. 4, R. S., which provides that any city or town may establish and maintain within its limits, a permanent wood, coal and fuel yard, for the purpose of selling, at cost, wood, coal and fuel to its inhabitants; that on February 4th,1913, the City of Portland voted that it establish and maintain, within its limitation (limits), a permanent wood, coal and fuel yard for the purpose of selling, at cost, wood, coal and fuel to its inhabitants, and that the money necessary for such purpose be raised by taxation; that the common council of said city, at a legal meeting
10 thereof, passed said vote; that the board of aldermen of said city, at a legal meeting thereof, passed said vote; and the mayor of said city, February 4th, 1913, approved said vote; that, February 4th, 1913 the said city voted to appropriate the sum of one thousand dollars to be devoted to carrying out the purposes of said vote; that the common council of said city, and the board of aldermen of said city, at a legal meeting passed said vote to appropriate the monies aforesaid, and that said vote to make the appropriation aforesaid was duly approved by the mayor of said city, and that it is the intention of said city to do all and singular the several acts contemplated by said vote, for the purposes therein set forth.

The principles of law relied upon by the plaintiffs were considered by the court in Laughlin v. City of Portland, 111 Maine, 486, which was a bill in equity asking for the same relief that the plaintiffs ask for in this bill, and involved the same statutes and votes of the city. In Laughlin v. City of Portland, supra, the plaintiff urged that the proposed action of the city was in violation of the Constitution of Maine, Art 1, Ses. 21, which provides that "Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it." In this case the plaintiffs urge that the proposed action of the city is in violation of the provisions of section 1 of the fourteenth article of amendment to the Constitution of the United States that the section of the statute authorizing cities and towns to establish municipal fuel yards, and the votes of the city of Portland establishing a municipal fuel yard and appropriating money for the purpose of so doing, are repugnant to said section 1 of the fourteenth amendment to the Constitution of the United States. The reasons urged in this case, in support of the bill, were fully considered by the court in Laughlin v. City of Portland,
11 supra, and upon the authority of that case we must hold that the statute in question, and the acts of the city set forth in the bill are valid, and not in violation of the fourteenth amendment to the Constitution of the United States. Demurrer sustained. Bill dismissed with costs."

I, William P. Thompson, hereby certify that I am the Reporter of Decisions in the State of Maine and that the foregoing is a true copy of the opinion of the Supreme Judicial Court in the above entitled cause decided February 27, 1915, wherein Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libbey, James T. Jack, Harry H. Pease, Charles F. Mountfort and Franklin H. Morse were then plaintiffs and the City of Portland was then defendant.

December 27, 1915.

W. P. THOMPSON,
*Reporter of Decisions.*

I, Llewellyn Barton, hereby certify that I am clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine and that the foregoing opinion is a true copy of the opinion on file in my office in the above entitled cause, and that the said William P. Thompson whose signature above appears is the Reporter of Decisions for the State of Maine.

December 27, 1915.

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

12 PORTLAND, MAINE, August 1, 1915.

Llewellyn Barton, Esq., Clerk, Supreme Judicial Court.

DEAR BRO. BARTON: In re Henry M. Jones et al in Equity v. City of Portland No. 2260, please enter my appearance as solicitor for the City of Portland, defendant.

JAMES A. CONNELLAN.

A true copy of the original on file in this office.

Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

13 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et als.
v.
CITY OF PORTLAND.

*Motion to Bring Forward.*

And now come Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F.

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Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, being all of the original plaintiffs in the above entitled cause except Franklin H. Morse, and say that said Franklin H. Morse, one of the original plaintiffs herein, died December 18, 1914 while said cause was pending before the law court, and that on March 2, 1915, the time when the certificate of decision from the Law Court was received by the clerk of courts in said County of Cumberland, no suggestion of the death of said Franklin H. Morse had been made upon the docket of this court in said county, where this cause is pending.

Wherefore they pray that said cause be brought forward on the docket of this court in said county to a subsequent term of this court in said county, to wit, a term of this court held in and for said county on the second Tuesday of April, A. D. 1915 and now being held, in order that such death may be suggested upon the docket and that the proper parties entitled to prosecute said cause may enter their appearance herein, and that the judgment in said cause may be entered up at said April term in accordance with such certificate from the Law Court, and in accordance with the provisions of section 49 of chapter 79 of the Revised Statutes.

August 24, 1915.

By EBEN WINTHROP FREEMAN,
*Their Solicitor.*

EBEN WINTHROP FREEMAN,
*Solicitor for Plaintiffs.*

A true copy of the original on file in this office.
Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

14 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et als.
v.
CITY OF PORTLAND.

*Order.*

This cause came on to be heard on the motion to bring the cause forward, and was argued by counsel, and it appearing that said Franklin H. Morse, one of the original plaintiffs herein, died December 18, 1914 while said cause was pending before the Law Court, and that on March 2, 1915, the time when the certificate of decision from

the Law Court was received by the clerk of courts in said County of Cumberland, no suggestion of the death of said Franklin H. Morse had been made upon the docket of this court in said county, where this cause is pending.

It is Ordered, Adjudged and Decreed that said cause be brought forward on the docket of this court in said county to a subsequent term of this court in said county, to wit, a term of this court held in and for said county on the second Tuesday of April, A. D. 1915 and now being held, in order that such death may be suggested upon the docket and that the proper parties entitled to prosecute said cause may enter their appearance herein, and that the judgment in said cause may be entered up at said April term in accordance with such certificate from the Law Court, and in accordance with the provisions of section 49 of chapter 79 of the Revised Statutes.

Dated at Portland in said County of Cumberland August 24, 1915.

GEORGE F. HALEY,
*Justice Supreme Judicial Court.*

Seen and Agreed to.
EBEN WINTHROP FREEMAN,
*Solicitor for Plaintiffs.*
JAMES A. CONNELLAN,
*Solicitor for Defendant.*

A true copy of the original on file in this office.
Attest:

[Seal Sup. Jud. Court, Maine. 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

15 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et als.
v.
CITY OF PORTLAND.

*Suggestion of the Death of Franklin H. Morse.*

And now come Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, being all of the original plaintiffs in the above entitled cause except Franklin H. Morse, and suggest to this court that the said Franklin H. Morse, one of the original plaintiffs herein, died December 18, 1914, and that thereafter Charles M. Hay and Alice C. Morse, both of Portland, in said County of Cumberland, were

duly appointed by the Probate Court of said County of Cumberland, a court having jurisdiction thereof, as administrators d. b. n. of the estate of said Franklin H. Morse, and that the said Charles M. Hay and the said Alice C. Morse are the duly appointed, qualified and acting administrators d. b. n. of the estate of said Franklin H. Morse.

Wherefore they pray that this suggestion of the death of the said Franklin H. Morse be entered upon the docket of this court.

August 24, 1915.

By EBEN WINTHROP FREEMAN,
*Their Solicitor.*

EBEN WINTHROP FREEMAN,
*Solicitor for Plaintiffs.*

A true copy of the original on file in this office.
Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

16 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et als.
v.
CITY OF PORTLAND.

*Appearance.*

To Llewellyn Barton, Clerk of the Supreme Judicial Court.

Please enter the appearance of Charles M. Hay and Alice C. Morse as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, one of the original plaintiffs in this cause.

August 30, 1915.

CHARLES M. HAY,
ALICE C. MORSE,
*Administrators d. b. n. Estate Franklin H. Morse,*
By PAYSON & VIRGIN,
*Their Solicitors.*

A true copy of the original on file in this office.
Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

17 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et als.
v.
CITY OF PORTLAND.

*Decree.*

In the above entitled cause wherein Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, and also Charles M. Hay and Alice C. Morse, both as administrators d. b. n. of the estate of Franklin H. Morse, deceased, all are plaintiffs, and wherein the City of Portland is defendant.

It is Ordered, Adjudged and Decreed that in accordance with the opinion and certificate from the Law Court on file in this cause the demurrer of the defendant is sustained and the bill of complaint of the plaintiffs is dismissed with costs.

September 1, 1915.

GEORGE F. HALEY,
*Justice, Supreme Judicial Court.*

A true copy of the original on file in this office.
Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

18 "EXHIBIT A."

STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et als.
v.
CITY OF PORTLAND.

*Summons and Severance.*

To Charles M. Hay and Alice C. Morse, as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, one of the original plaintiffs in the above entitled cause:

Please take notice that we, being all the original plaintiffs in said cause, except said Franklin H. Morse, desire to proceed by writ of

error to the United States Supreme Court to review the final decision in this cause rendered September 1, 1915, and as you are jointly interested with us therein, we hereby request you to join with us on or before September 15, 1915 in a petition for a writ of error, and if you do not so join us, we alone shall present and prosecute such petition.

Dated September 1, 1915.

HENRY M. JONES,
HERBERT PAYSON,
HOWARD WINSLOW,
JOHN W. GULLIVER,
WILLIAM LEAVITT,
CARL A. WEBER,
CHARLES F. GUPTILL,
JOHN E. SHEARMAN,
HENRY S. PAYSON,
GEORGE M. BLAKE,
ROBERT D. LIBBY,
JAMES T. JACK,
HARRY H. PEASE,
CHARLES F. MOUNTFORT,
*Plaintiffs,*

By Their Solicitor, EBEN WINTHROP FREEMAN.

STATE OF MAINE,
*Cumberland, ss:*

PORTLAND, MAINE, September 1, 1915.

I this day served the foregoing summons and severance upon each Charles M. Hay and Alice C. Morse as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, by giving in hand to each of them a duplicate of the original foregoing summons and severance.

FLORENCE F. DRISCOLL,
*Deputy Sheriff for said County of Cumberland.*

Fees:

| | |
|---|---|
| Service | 2.— |
| Travel | .72 |
| | 2.72 |

A true copy of the original on file in this office.
Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

19 "EXHIBIT B."

STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et als.
v.
CITY OF PORTLAND.

*Acknowledgement of Service of Summons.*

We, Charles M. Hay and Alice C. Morse, both as administrators d. b. n. of the Estate of said Franklin H. Morse, deceased, hereby acknowledge due service upon us of the foregoing summons and severance, and hereby announce that we refuse to join in the proposed petition for a writ of error, and we agree that we will neither present nor prosecute any such petition in behalf of ourselves or in behalf of the Estate of said Franklin H. Morse.

September 7, 1915.

CHARLES M. HAY,
ALICE C. MORSE,
*Administrators d. b. n. Estate Franklin H. Morse,*
By PAYSON & VIRGIN,
*Their Attorneys.*

A true copy of the original on file in this office.
Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

20 PORTLAND, MAINE, December 13, 1915.

Llewellyn Barton, Esq., Clerk Supreme Judicial Court.

DEAR BRO. BARTON: In re Henry M. Jones et als in equity v. City of Portland No. 2260, please enter my appearance as solicitor for the City of Portland, defendant.

HENRY P. FRANK.

A true copy of the original on file in this office.
Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

21 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als, Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Petition for Writ of Error.*

And now come Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, plaintiffs in the above entitled cause and hereinafter called said plaintiffs in error, and say that lately, to wit, on September 1, A. D. 1915 the Supreme Judicial Court in and for the County of Cumberland in said state of Maine entered final judgment herein in favor of said defendant and against the plaintiffs in said cause, in which judgment and the proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiffs in said cause, all of which said errors will more in detail appear by the assignment of errors to be filed with this petition. And the said plaintiffs in error say that they and their co-plaintiffs, Charles M. Hay and Alice C. Morse, as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, are all the plaintiffs in said cause, and that said plaintiffs in error have served due notice upon said co-plaintiffs whereby said plaintiffs in error have requested said co-plaintiffs to join in this petition for a writ of error as shown by "Exhibit A" hereto annexed and hereby made a part hereof, and that the said co-plaintiffs have refused to join in this petition, as shown by "Exhibit B" hereto annexed and hereby
22 made a part hereof.

Said Supreme Judicial Court is the highest court of said state in which a decision in this cause may be had. In said cause rights, privileges and immunities were claimed by said plaintiffs in error under the Constitution and Statutes of the United States, and under authority exercised under the United States, and the decision of the Supreme Judicial Court was against the rights, privileges and immunities especially set up and claimed under the Constitution, statutes and authority of the United States.

Wherefore said plaintiffs in error pray that a severance may be granted and that said plaintiffs in error may be granted the right to proceed further without joining said co-plaintiffs; and said plaintiffs in error further pray that a writ of error may issue out of the Supreme Court of the United States to the end that the errors so com-

plained of may be corrected and said judgment reversed, and that a transcript of the record, proceedings and papers in this suit duly authenticated may be transmitted to the Supreme Court of the United States; and said plaintiffs in error further pray that an order may issue fixing the amount of a bond.

Dated at Portland in said County of Cumberland this twentieth day of December, A. D. 1915.

HENRY M. JONES,
HERBERT PAYSON,
HOWARD WINSLOW,
JOHN W. GULLIVER,
WILLIAM LEAVITT,
CARL A. WEBER,
CHARLES F. GUPTILL,
JOHN E. SHEARMAN,
HENRY S. PAYSON,
GEORGE M. BLAKE,
ROBERT D. LIBBY,
JAMES T. JACK,
HARRY H. PEASE,
CHARLES F. MOUNTFORT,
By EBEN WINTHROP FREEMAN,
*Solicitor and Counsel for said Plaintiffs in Error.*

23 "EXHIBIT A."

STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et als.
v.
CITY OF PORTLAND.

*Summons and Severance.*

To Charles M. Hay and Alice C. Morse, as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, one of the original plaintiffs in the above entitled cause:

Please take notice that we, being all the original plaintiffs in said cause, except said Franklin H. Morse, desire to proceed by writ of error to the United States Supreme Court to review the final decision in this cause rendered September 1, 1915, and as you are jointly interested with us therein, we hereby request you to join with us on or before September 15, 1915 in a petition for a writ of error, and if

you do not so join us, we alone shall present and prosecute such petition.

Dated September 1, 1915.

HENRY M. JONES,
HERBERT PAYSON,
HOWARD WINSLOW,
JOHN W. GULLIVER,
WILLIAM LEAVITT,
CARL A. WEBER,
CHARLES F. GUPTILL,
JOHN E. SHEARMAN,
HENRY S. PAYSON,
GEORGE M. BLAKE,
ROBERT D. LIBBY,
JAMES T. JACK,
HARRY H. PEASE,
CHARLES F. MOUNTFORT,
*Plaintiffs,*

By Their Solicitor, EBEN WINTHROP FREEMAN.

STATE OF MAINE,
*Cumberland, ss:*

PORTLAND, MAINE, September 1, 1915.

I this day served the foregoing summons and severance upon each Charles M. Hay and Alice C. Morse as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, by giving in hand to each of them a duplicate of the original foregoing summons and severance.

FLORENCE F. DRISCOLL,
*Deputy Sheriff for said County of Cumberland.*

Fees:

| | |
|---|---|
| Service ..... | 2.00 |
| Travel ..... | .72 |
| | 2.72 |

24 "EXHIBIT B."

STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

HENRY M. JONES et als.
v.
CITY OF PORTLAND.

*Acknowledgement of Service of Summons.*

We, Charles M. Hay and Alice C. Morse, both as administrators d. b. n. of the Estate of said Franklin H. Morse, deceased, hereby

acknowledge due service upon us of the foregoing summons and severance, and hereby announce that we refuse to join in the proposed petition for a writ of error, and we agree that we will neither present nor prosecute any such petition in behalf of ourselves or in behalf of the Estate of said Franklin H. Morse.

September 7, 1915.

CHARLES M. HAY,
ALICE C. MORSE,
*Administrators d. b. n. Estate Franklin H. Morse,*
By PAYSON & VIRGIN,
*Their Attorneys.*

25 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als., Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Assignment of Errors.*

And now come Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, the plaintiffs in error in the above entitled cause, in which said cause the City of Portland is defendant in error, and with their petition for writ of error make and file the following assignment of errors in the record and proceedings of said cause, to wit:

The Supreme Judicial Court of the State of Maine erred in holding and deciding that section eighty-seven of chapter four of the Revised Statutes of the State of Maine, being chapter one hundred twenty-two of the Acts of the legislature of Maine of the year 1903 and approved March 19, 1903, was valid. Said court erred in holding and deciding that the authority exercised by said city under said section eighty-seven was valid. The validity of said section and of the authority exercised thereunder by said city was drawn in question on the ground of their being repugnant to section one of the Fourteenth Article of Amendments to the Constitution of the United States, and the decision of said Supreme Judicial Court was in favor of such their validity. Said errors are more particularly set forth as follows:

26 First. Said court erred in sustaining the demurrer of the defendant in error to the bill of complaint of the plaintiffs in error and in dismissing said bill.

Second. Said court erred in holding and deciding that the estab-

lishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants is a public use.

Third. Said court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants, is valid.

Fourth. Said court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants does not abridge the privileges or immunities of the plaintiffs in error as citizens of the United States.

Fifth. Said court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants does not deprive the plaintiffs in error of property without due process of law, and is not in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Sixth. Said court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for
the purpose of selling at cost wood, coal and fuel to its in-
27 habitants does not deny to the plaintiffs in error the equal
protection of the laws and is not in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Seventh. Said court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants, and the appropriation by said city, for such establishment and maintenance, of money raised by taxation of the plaintiffs in error, are valid.

Eighth. Said court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants, and the appropriation by said city, for such establishment and maintenance, of money raised by taxation of the plaintiffs in error, do not abridge the privileges or immunities of the plaintiffs in error as citizens of the United States and are not in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Ninth. Said court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabi-

tants, and the appropriation by said city, for such establishment and maintenance, of money raised by taxation of the plaintiffs in error, do not deprive the plaintiffs in error of property without due process of law, and are not in violation of the provisions of
28 section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Tenth. Said court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants, and the appropriation by said city, for such establishment and maintenance, of money raised by taxation of the plaintiffs in error, do not deny to the plaintiffs in error as persons within the jurisdiction of the State of Maine the equal protection of the laws, and are not in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Eleventh. Said court erred in holding and deciding that said section eighty-seven is valid and is not a law made by the State of Maine in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Twelfth. Said court erred in holding and deciding that said section eighty-seven is not a law made and enforced by the State of Maine in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Thirteenth. Said court erred in holding and deciding that said section eighty-seven is not a law made by the State of Maine and abridging the privileges or immunities of the plaintiffs in error as citizens of the United States.

Fourteenth. Said court erred in holding and deciding that said section eighty-seven is not a law made and enforced by the State of Maine and abridging the privileges or immunities of the plaintiffs in error as citizens of the United States.

29 Fifteenth. Said court erred in holding and deciding that by the enactment of said section eighty-seven by the legislature of the State of Maine the State of Maine is not depriving the plaintiffs in error of property without due process of law.

Sixteenth. Said court erred in holding and deciding that by the enactment of said section eighty-seven by the legislature of the State of Maine and by the exercise by said city of its authority thereunder the State of Maine is not depriving the plaintiffs in error of property without due process of law.

Seventeenth. Said court erred in holding and deciding that by the enactment of said section eighty-seven and by the exercise by State of Maine the State of Maine is not denying to the plaintiffs in error as persons within its jurisdiction the equal protection of the laws.

Eighteenth. Said court erred in holding and deciding that by the enactment of said section eighty-seven and by the exercise by said city of its authority thereunder the State of Maine is not deny-

ing to the plaintiffs in error as persons within its jurisdiction the equal protection of the law.

30 Wherefore, by reason of said errors said plaintiffs in error pray that said judgment of the Supreme Judicial Court of the State of Maine against them may be reversed, and that a judgment be rendered in favor of said plaintiffs in error, and for their costs.

HENRY M. JONES,
HERBERT PAYSON,
HOWARD WINSLOW,
JOHN W. GULLIVER,
WILLIAM LEAVITT,
CARL A. WEBER,
CHARLES F. GUPTILL,
JOHN E. SHEARMAN,
HENRY S. PAYSON,
GEORGE M. BLAKE,
ROBERT D. LIBBY,
JAMES T. JACK,
HARRY H. PEASE,
CHARLES F. MOUNTFORT,
By EBEN WINTHOP FREEMAN,
*Solicitor and Counsel for said Plaintiffs in Error.*

31 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als., Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Order of Severance and Allowance of Petition for Writ of Error.*

In the above entitled cause, wherein Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort are plaintiffs and are hereinafter called said plaintiffs, and wherein Charles M. Hay and Alice C. Morse, both as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, are the only co-plaintiffs, and it appearing that said co-plaintiffs have been duly served with summons and have refused to join the said plaintiffs in the petition of said plaintiffs for said writ of error, a severance, pursuant to the request of said plaintiffs, is accordingly hereby ordered and a right to said plaintiffs to further proceed without joining said co-plaintiffs is hereby granted; and it appearing that in the above entitled cause the validity of section eighty-

seven of chapter four of the Revised Statutes of the State of Maine, being chapter one hundred twenty-two of the Acts of the Legislature of Maine of the year 1903 and approved March 19, 1903 and of the authority exercised thereunder by said City of Portland was drawn in question on the ground of their being repugnant to section one of the Fourteenth Article of Amendments to the Constitution of the United States, and it further appearing that the decision of said Supreme Judicial Court was in favor of such their validity, a
32 writ of error as prayed for by said plaintiffs is allowed to said plaintiffs upon the execution of a bond by said plaintiffs in the sum of two hundred fifty (250) dollars.

Dated at Portland in said County of Cumberland and State of Maine this twentieth day of December, A. D., 1915.

[Seal Sup. Jud. Cor. Maine. Sigil. 1820.]

ALBERT R. SAVAGE,
*Chief Justice, Supreme Judicial Court of the State of Maine.*

33 *Bond.*

Know all men by these presents, that we, Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, all of Portland in the County of Cumberland and State of Maine, as principals, and Fred H. Johnson and Rufus Cutler Libby, both of said Portland, as sureties, are held and firmly bound unto the City of Portland, a body politic and corporate, located in said County of Cumberland and State of Maine, in the full and just sum of two hundred and fifty (250) dollars to be paid and to the said City of Portland, its certain attorney, its successors or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this twentieth day of December in the yar of our Lord one thousand nine hundred and fifteen.

Whereas, lately, to wit, on September 1, A. D. 1915, in a cause depending in the Supreme Judicial Court of the State of Maine held in and for said County of Cumberland between Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, plaintiffs therein and hereinafter called said plaintiffs, and their co-plaintiffs, Charles M. Hay and Alice C. Morse, as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, and hereinafter called said co-plaintiffs, and said City of Portland, defendant, judgment was rendered against said plaintiffs and said co-plaintiffs; and said plaintiffs having requested and obtained from the Chief Justice of the said Supreme

Judicial Court a severance as to said co-plaintiffs, and said
34 plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in said cause, and a citation directed to the said City of Portland citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of this obligation is such, that if said plaintiffs shall prosecute their said writ of error to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

HENRY M. JONES. [L. S.]
HERBERT PAYSON. [L. S.]
HOWARD WINSLOW. [L. S.]
JOHN GULLIVER. [L. S.]
WILLIAM LEAVITT. [L. S.]
CARL A. WEBER. [L. S.]
CHARLES F. GUPTILL. [L. S.]
JOHN E. SHERMAN. [L. S.]
HENRY S. PAYSON. [L. S.]
GEORGE M. BLAKE. [L. S.]
ROBERT D. LIBBY. [L. S.]
JAMES T. JACK. [L. S.]
HARRY H. PEASE. [L. S.]
CHARLES F. MOUNTFORT. [L. S.]
FRED H. JOHNSON. [L. S.]
RUFUS CUTLER LIBBY. [L. S.]

Approved by—

ALBERT R. SAVAGE,
*Chief Justice of the Supreme Judicial Court of the State of Maine.*

Signed, sealed and delivered in presence of—
EBEN WINTHROP FREEMAN, to
H. M. J.,
H. P.,
H. W.,
J. G.,
W. L.,
C. A. W.,
C. F. G.,
J. E. S.,
H. S. P.,
G. M. B.,
R. D. L.,
J. T. J.,
H. H. P.,
C. F. M.,
F. H. J.,
& R. C. L.

35 A true copy of the original on file in this office.

Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Judicial Court of the State of Maine, holden at Portland in and for the County of Cumberland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, plaintiffs therein and hereinafter called said plaintiffs, and their co-plaintiffs, Charles M. Hay and Alice C. Morse, as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, and hereinafter called said co-plaintiffs, and the City of Portland, defendant, in a plea of a bill in equity wherein judgment was rendered against said plaintiffs and said co-plaintiffs; and said plaintiffs having requested and obtained from the Chief Justice of said Supreme Judicial Court a severance as to said co-plaintiffs; wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under
37 the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said plaintiffs as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within

thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of December, in the year of our Lord one thousand nine hundred and fifteen.

[Seal of the District Court, Maine.]

JAMES E. HERVEY.
*Clerk of the District Court of the United States, District of Maine.*

Allowed by
ALBERT R. SAVAGE,
*Chief Justice of the Supreme Judicial Court of the State of Maine.*

38 [Endorsed:] Supreme Court of the United States. October term, 191—. Henry M. Jones et als, Plaintiffs in Error vs. City of Portland, Defendant in Error. Writ of Error. Filed December 20, 1915. Llewellyn Barton, Clerk, Supreme Judicial Court in and for the County of Cumberland and State of Maine. [Seal Sup. Jud. Court, Maine, 1820.]

39 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als, Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Certificate of Lodgment.*

I, Llewellyn Barton, clerk of said Supreme Judicial Court in and for said County of Cumberland, do hereby certify that there was lodged with me as such clerk on December 20th, A. D. 1915 in the above entitled cause, wherein Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort are plaintiffs and Charles M. Hay and Alice C. Morse, administrators d. b. n. of the Estate of Franklin H. Morse, deceased, are co-plaintiffs, a severance as to said co-plaintiffs having been granted to said plaintiffs by the Honorable Albert R. Savage, Chief Justice of said Supreme Judicial Court, and the City of Portland is defendant, the following documents, to wit:

1. The original bond, of which a copy is hereto annexed.
2. Two copies of the writ of error, as herein set forth,—one for said defendant and one to file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Portland in said County of Cumberland this twentieth day of December, A. D., 1915.

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

40 & 41 UNITED STATES OF AMERICA, *ss:*

To the City of Portland, a body politic and corporate located in the County of Cumberland and State of Maine, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Judicial Court of the State of Maine, wherein Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort are plaintiffs in error, (Charles M. Hay and Alice C. Morse, as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, having been co-plaintiffs with said plaintiffs in error in said Supreme Judicial Court in the cause to which said writ of error relates, and a severance as to said co-plaintiffs having been obtained by said plaintiffs in error from the Chief Justice of said Supreme Judicial Court), and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert R. Savage, Chief Justice of the Supreme Judicial Court of the State of Maine this twentieth day of December, in the year of our Lord one thousand nine hundred and fifteen.

ALBERT R. SAVAGE,
*Chief Justice of the Supreme Judicial Court of the State of Maine.*

Attest:

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for the County of Cumberland and State of Maine.*

42 *Acknowledgment of Service of Citation.*

PORTLAND, MAINE, December 23, 1915.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance for said defendant in error in the Supreme Court of the United States.

HENRY P. FRANK,
*Solicitor and Counsel for said City of Portland.*

*Return of Service of Citation.*

UNITED STATES OF AMERICA,
*State of Maine, Cumberland County, ss:*

I, Lewis W. Moulton, of lawful age, being first duly sworn, on oath deposes and says:

I was duly authorized by Honorable Albert R. Savage, Chief Justice of the Supreme Judicial Court of the State of Maine, to serve upon the City of Portland, the defendant in error, the citation hereto attached, and thereupon I served the same on said City of Portland by delivering in hand to Wilford G. Chapman the Mayor of said City of Portland, a true and certified copy of said citation at Portland in said County of Cumberland on the twenty-second day of December, A. D., 1915.

Dated at said Portland this twenty second day of December, A. D. 1915.

LEWIS W. MOULTON.

Sworn to and subscribed this twenty-second day of December, A. D., 1915.

Before me,

[Seal Eben W. Freeman, Notary Public, Portland, Maine.]

EBEN WINTHROP FREEMAN,
*Notary Public, Cumberland County, Maine.*

(My commission expires July 29, 1917.)

Mileage 1 mile at 12¢..... .12
Service ..... 1.00

Amount .....$1.12 paid by plaintiffs in error.
LEWIS W. MOULTON.

43 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als., Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Return to Writ of Error.*

And now the Justices of the Supreme Judicial Court of the State of Maine make return to this writ by annexing thereto and transmitting herewith under the seal of said Supreme Judicial Court a true and attested copy of the record and proceedings in the within entitled cause, wherein Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort are plaintiffs and Charles M. Hay and Alice C. Morse, administrators d. b. n. of the Estate of Franklin H. Morse, deceased, are co-plaintiffs, a severance as to said co-plaintiffs having been granted to said plaintiffs by the Honorable Albert R. Savage, Chief Justice of said Supreme Judicial Court, and the City of Portland is defendant, together with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Witness, the Honorable Albert R. Savage, Chief Justice of the Supreme Judicial Court of the State of Maine this twenty seventh day of December, A. D. 1915.

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of the Supreme Judicial Court in and for the County of Cumberland and State of Maine.*

Costs of transcript $1.40 paid by plaintiffs in error.
LLEWELLYN BARTON, *Clerk.*

44 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als., Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Certificate of Final Decree.*

I, Llewellyn Barton, Clerk of said Supreme Judicial Court in and for said County of Cumberland, hereby certify that in the above entitled cause, wherein Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort are plaintiffs and Charles M. Hay and Alice C. Morse, administrators d. b. n. of the Estate of Franklin H. Morse, deceased, are co-plaintiffs, a severance as to said co-plaintiffs having been granted to said plaintiffs by the Honorable Albert R. Savage, Chief Justice of said Supreme Judicial Court, and the City of Portland is defendant, that on September 1, 1915 a final decree was entered in said cause as follows, to wit:

"In the above entitled cause wherein Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort, and also Charles M. Hay and Alice C. Morse, both as administrators d. b. n. of the Estate of Franklin H. Morse, deceased, all are plaintiffs, and wherein the City of Portland is defendant,

It is ordered adjudged and decreed that in accordance with the opinion and certificate from the Law Court on file in this
45 cause the demurrer of the defendant is sustained and the bill of complaint of the plaintiffs is dismissed with costs.

September 1, 1915.

GEORGE F. HALEY,
*Justice Supreme Judicial Court."*

Witness, the Honorable Albert R. Savage, Chief Justice of our said Supreme Judicial Court at Portland in said County of Cumberland this twenty first day of December, A. D. 1915.

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of said Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

46 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als., Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Authentication of Record.*

I, Llewellyn Barton, Clerk of said Supreme Judicial Court in and for said County of Cumberland, hereby certify that the papers hereunto annexed are a true, full and complete transcript of the record and proceedings in the above entitled cause, wherein Henry M. Jones, Herbert Payson, Howard Winslow, John W. Gulliver, William Leavitt, Carl A. Weber, Charles F. Guptill, John E. Shearman, Henry S. Payson, George M. Blake, Robert D. Libby, James T. Jack, Harry H. Pease and Charles F. Mountfort are plaintiffs, and Charles M. Hay and Alice C. Morse, administrators d. b. n. of the Estate of Franklin H. Morse, deceased, are co-plaintiffs, a severance as to said co-plaintiffs having been granted to said plaintiffs by the Honorable Albert R. Savage, Chief Justice of the Supreme Judicial Court, and the City of Portland is defendant, in said Supreme Judicial Court determined; and also of the opinion of the court rendered therein as the same now appears on file in my office; and attached thereto and transmitted with said record are the original petition for writ of error, original assignment of errors and prayer for reversal, original order of severance and allowance of petition for writ of error, a copy of the bond, the original of which is on file in my office, original writ of error, original citation with acknowledgment of service and return of service thereon, original return to writ of error,
47 original certificate of final decree.

In witness whereof, I, the said Llewellyn Barton, have hereunto set my hand and the seal of our said court at Portland in said County of Cumberland this twenty seventh day of December, A. D. 1915.

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of said Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

48 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als., Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Authentication.*

I, Albert R. Savage, Chief Justice of the Supreme Judicial Court of the State of Maine, do certify that Llewellyn Barton, Esq., whose signature is affixed to the papers hereto annexed is clerk of said court holden at Portland and in and for the County of Cumberland in said state, and hath the keeping of all the files, records and proceedings of said court for said County of Cumberland, and is by law the proper person to make out and to certify copies of all records and proceedings of the said court, and that full faith and credit is and ought to be given to his acts and attestations done as aforesaid and that his attestation to the papers hereunto annexed is in due form of law.

In witness whereof I have hereunto set my hand and caused the seal of said court to be hereunto affixed this twenty-seventh day of December, A. D. 1915.

[Seal Sup. Jud. Court, Maine, 1820.]

ALBERT R. SAVAGE,
*Chief Justice of said Supreme Judicial Court.*

49 STATE OF MAINE,
*Cumberland, ss:*

Supreme Judicial Court. In Equity.

No. 2260.

HENRY M. JONES et als., Plaintiffs,
v.
CITY OF PORTLAND, Defendant.

*Certificate of Clerk.*

I, Llewellyn Barton, Clerk of the Supreme Judicial Court within and for the County of Cumberland and State of Maine, hereby certify that the Honorable Albert R. Savage, by whom the foregoing certificate was made and who has thereunto subscribed his name was at the time of the making thereof and still is Chief Justice of the Supreme Judicial Court of said state duly commissioned and qualified;

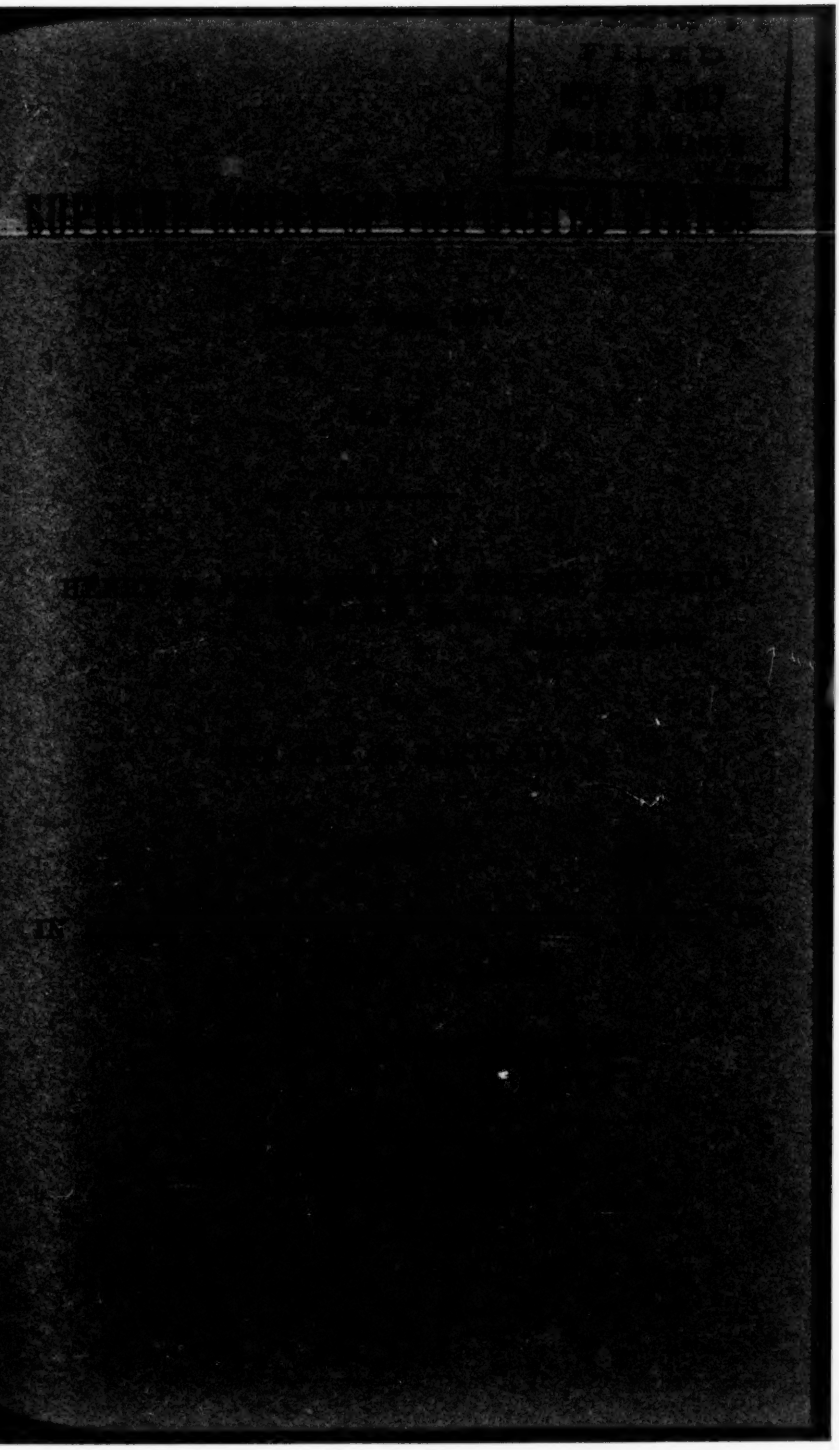
to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof I have hereunto set my hand and affixed the seal of said court this twenty-seventh day of December, A. D. 1915.

[Seal Sup. Jud. Court, Maine, 1820.]

LLEWELLYN BARTON,
*Clerk of said Supreme Judicial Court in and for said County of Cumberland and State of Maine.*

Endorsed on cover: File No. 25,068. Maine Supreme Judicial Court. Term No. 336. Henry M. Jones, Herbert Payson, Howard Winslow et al., plaintiffs in error, vs. The City of Portland. Filed January 3d, 1916. File No. 25,068.



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# SUPREME COURT OF THE UNITED STATES

**October Term, 1917.**

**No. 77.**

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HENRY M. JONES, HERBERT PAYSON, HOWARD WINSLOW, ET AL.,
*Plaintiffs in Error*

vs.

THE CITY OF PORTLAND,

---

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

## BRIEF OF PLAINTIFFS IN ERROR.

This cause comes before this Court on writ of error to the Supreme Judicial Court of the State of Maine to review a decree dismissing a bill filed by the plaintiffs in error for the purpose of enjoining the defendant, the City of Portland, from establishing a permanent fuel yard.

## 1. STATEMENT OF THE CASE.

In 1903 the Legislature of the State of Maine enacted the following Statute: "Any city or town may establish and maintain, within its limits, a permanent wood, coal and fuel yard, for the purpose of selling, at cost, wood, coal and fuel to its inhabitants. The term 'at cost' as used herein shall be construed as meaning without financial profit." This Statute appeared in R. S. Maine, 1903, chapter 4, section 87. Record, p. 1.

In February, 1913, the City of Portland, Maine, following the language of this Statute, voted to establish and maintain within its limitations a permanent coal and fuel yard, for the purpose of selling at cost, wood, coal and fuel to its inhabitants, that the money necessary for such purpose be raised by taxation, and that the term "at cost" as used in said vote should be construed as meaning without financial profit, and also at that time voted to appropriate one thousand (1,000) dollars to be devoted towards carrying out the purposes of this vote. Record, p. 1.

The plaintiffs claim that the establishment and maintenance of a municipal fuel yard is a purpose not authorized by law, that it is not a public purpose.

Under the provisions of the Revised Statutes of Maine, 1903, chapter 79, section 6, clause eleven, when cities for a purpose not authorized by law vote to pledge their credit or to raise money by taxation or to exempt property therefrom or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purpose, the Supreme Judicial Court shall have jurisdiction in equity on petition or application of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint. The plaintiffs were all resident and taxable inhabitants of the City of Portland and more than ten in number, and brought this bill of complaint to enjoin the City of Portland from establishing or maintaining such fuel yard. Record, p. 3.

The plaintiffs, being born in the United States and citizens of the United States, and citizens and residents of the State of Maine and subject to the jurisdiction of the United States (record, p. 1), brought this bill of complaint and based their action upon their rights under section one of the Fourteenth Article of the Amendments to the Constitution of the United States. Section one is as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

To the plaintiff's bill the defendant demurred generally and the plaintiff joined in the demurrer. Record, p. 5.

The Court in its opinion (record, p. 6) held that the statute in question was not repugnant to section one of the Fourteenth Amendment to the Constitution of the United States and that the acts of the city set forth in the bill were valid and not in violation of section one of the Fourteenth Amendment. The demurrer was sustained and the bill was dismissed.

Thereupon this writ of error was applied for and was filed in this Court January 3, 1916.

The question is thus squarely raised whether or not the establishment of a municipal fuel yard is a public purpose.

The plaintiffs in their bill of complaint and consistently throughout this case have claimed that the Maine Statute is a law made and enforced by the State of Maine which abridges the privileges and immunities of the plaintiffs as citizens of the United States and is therefore a law in violation of section one of the Fourteenth Amendment, that the establishment of a municipal fuel yard is not a public purpose, that not being public it is an inherent limitation on the power of taxation that taxation for such a purpose is unlawful, that therefore the plaintiffs would be deprived of property without due process of law in violation of the provisions of section one of the Fourteenth Article of the Amendments to the Constitution of the United States; and that this Court should in view of the Fourteenth Amendment declare void the Maine Statute in question for the specific reasons set forth in the assignments and specifications of error.

The Federal question, it will be noted, raised by the bill of complaint and by the demurrer, was made the sole question at issue.

## 2. ASSIGNMENTS AND SPECIFICATIONS OF ERROR.

The specifications in the assignment of error are incorporated in the record, pp. 18-22. Those intended to be presented in the present argument are the following:

The decree of the Supreme Judicial Court of Maine dismissing the plaintiff's bill of complaint is erroneous in that

First. Said Court erred in sustaining the demurrer of the defendant in error to the bill of complaint of the plaintiffs in error and in dismissing said bill.

Second. Said Court erred in holding and deciding that the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants is a public use.

Third. Said Court erred in holding and deciding that taxation of the plaintiff's in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants, is valid.

Fourth. Said Court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants does not abridge the privileges or immunities of the plaintiffs in error as citizens of the United States.

Fifth. Said Court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants does not deprive the plaintiffs in error of property without due process of law, and is not in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Sixth. Said Court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants does not deny to the plaintiffs in error the equal protection of the laws and is not in violation of the provisions of section one of the Fourteenth Article of Amendment to the Constitution of the United States.

Seventh. Said Court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants, and the appropriation by said city, for such establishment and maintenance, of money raised by taxation of the plaintiffs in error, are valid.

Eighth. Said Court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost, wood, and fuel to its inhabitants, and the appropriation by said city, for such establishment and maintenance, of money raised by taxation of the plaintiffs in error, do not abridge the privileges or immunities of the plaintiffs in error as citizens of the United States and are not in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Ninth. Said Court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost, wood coal and fuel to its inhabitants, and the appropriation by said city, for such establishment and maintenance, of money raised by taxation of the plaintiffs in error, do not deprive the plaintiffs in error of property without due process of law, and are not in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Tenth. Said Court erred in holding and deciding that taxation of the plaintiffs in error by said city for the establishment and maintenance by said city of such permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants, and the appropriation by said city, for such establishment and maintenance, of money raised by taxation of the plaintiffs in error, do not deny to the plaintiffs in error as persons within the jurisdiction of the State of Maine the equal protection of the laws, and are not in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Eleventh. Said Court erred in holding and deciding that said section eighty-seven is valid and is not a law made by the State of Maine in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Twelfth. Said Court erred in holding and deciding that said section eighty-seven is not a law made and enforced by the State of

Maine in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States.

Thirteenth. Said Court erred in holding and deciding that said section eighty-seven is not a law made by the State of Maine and abridging the privileges or immunities of the plaintiffs in error as citizens of the United States.

Fourteenth. Said Court erred in holding and deciding that said section eighty-seven is not a law made and enforced by the State of Maine and abridging the privileges or immunities of the plaintiffs in error as citizens of the United States.

Fifteenth. Said Court erred in holding and deciding that by the enactment of said section eighty-seven by the legislature of the State of Maine the State of Maine is not depriving the plaintiffs in error of property without due process of law.

Sixteenth. Said Court erred in holding and deciding that by the enactment of said section eighty-seven by the legislature of the State of Maine and by the exercise by said city of its authority thereunder the State of Maine is not depriving the plaintiffs in error of property without due process of law.

Seventeenth. Said Court erred in holding and deciding that by the enactment of said section eighty-seven and by the exercise by the State of Maine the State of Maine is not denying to the plaintiffs in error as persons within its jurisdiction the equal protection of the laws.

Eighteenth. Said Court erred in holding and deciding that by the enactment of said section eighty-seven and by the exercise by said city of its authority thereunder the State of Maine is not denying to the plaintiffs in error as persons within its jurisdiction the equal protection of the law.

## 3. THE CONSTITUTION OF THE UNITED STATES.

Section one of the Fourteenth Amendment to the Constitution of the United States is as follows:—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Taxation for a use not public is also a deprivation of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Nichols on **Taxation** in Mass., 1913, p. 47, n. 2.

*Citizens' Savings Loan Association* v. *Topeka*, 1874, 20 Wall 655.

Writ of error to the U. S. Circuit Court, district of Kansas. The plaintiff in error brought action in the circuit court for the district of Nebraska on coupons attached to bonds of the city of Topeka. The bonds were issued by the city payable to a manufacturing company for the purpose of aiding and encouraging the building of bridge shops in the city an act of the legislature of Kansas. The declaration also alleges that the interest coupons first due were paid out of a fund raised by taxation for that purpose. Demurrer was sustained. Judgment for defendant. Whereupon writ of error was brought. The defendant claimed that by §5 Art. XII of the Kansas Constitution that the power of taxation of towns shall be so restricted as to prevent the abuse of such power. The proposition is that the act authorizes towns by issuing bonds to take property of the citizen under the guise of taxation to pay these bonds and to use it in the aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can be exercised only for a public use, to the aid of individual interests and personal purposes of profit and gain.

HELD,—that the act was unconstitutional in view of the state constitution. Mr. Justice Miller, delivering the opinion, said:

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be

easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not."

"It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

*In re Tuthill*, 1900, 163 N. Y., 133.

The State Drainage Act of 1895 was passed under a provision in the State Constitution to the effect that general laws might be passed permitting of owners of agricultural lands to construct drains upon the lands of others with just compensation. This portion of the Constitution was a portion of an amendment of the State Constitution adopted in 1894. It is objected that the amendment to the Constitution is violative of the Federal Constitution in that the taking of private property for a use not public, but strictly private, is authorized by the exercise of the right of eminent domain.

HELD: If the amendment is in conflict with any of the provisions of the Federal Constitution it must fail; for within its sphere of operation that instrument is supreme and no more by constitutional provisions than by legislation can states of the Union override its prohibitions. It is an ancient principle, which entered into our social compact, that the use for which private property may be taken must be a public one, whether taking be by the exercise of the right of eminent domain or by that of taxation. The sovereign power is incapable of conferring any right to interfere with private property, except it be needed for public objects. To take land for any other than a public use, to take it from one citizen and to transfer it to another, even for full compensation, would be to violate the contract by which the land was originally granted by the government.

"The fourteenth amendment of the Federal Constitution, in prohibiting a state from depriving any person of life, liberty or property, without due process of law, protects the citizen against the taking of his property for any other than a public use, either under the guise of taxation, or by the assumption of the right of eminent domain. It is a security against the arbitrary spoliation of property, or any abridgment of the immunities of citizens of the United States. The State Constitution, from the beginning, by authorizing the appropriation of private property for public use, impliedly declared that for any other use private property should not be taken from one and applied to the private use of another."

"It was observed by Judge Denio, in *People* v. *Smith* (21 N. Y. at p. 598), that it would not be due process of law to 'appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use.' Whether that is a public use, for which private property is authorized to be taken, will depend upon the object aimed at and whether the plan has such an obvious, or recognized, character of public utility, as to justify the exercise of the right of eminent domain, or of the power of taxation, in its favor. I suppose, in that consideration, when some new constitutional provision is in question, regard should be had to prior conditions, in the laws and in the decisions of the courts of the state upon the subject, which illustrate some settled policy of the community. That can be understood by reference to the cases which arose under the Mill Acts in the New England states, the Irrigation Acts in the Western States and the Drainage Statute of New Jersey." (In the case at bar it will be observed that the Constitution of Maine expressly restricts power of the legislature to enact only those laws which are not repugnant to the Federal Constitution.)

"When the Constitution of this state was amended in this way by the people, in 1894, it was intended, undoubtedly, by embodying in the organic law an authorization for the passage of general laws permitting owners of agricultural lands to construct and maintain ditches for the drainage of their properties, to conclusively sanction such legislation thereafter. The probable intent of any law may often be stated from a consideration of the political conditions which existed; the presence of which might be deemed, not unnaturally, to operate upon the lawmakers. An amendment of the organic law of the state represents the expression of the dominant popular sentiment upon the subject and in this instance it, undoubtedly, represents a purpose to make that lawful which before was not. The reasoning

would be that, if it were unconstitutional and, therefore, unlawful before to recognize the taking of private property for the private purpose of the drainage of agricultural lands, by giving it constitutional warrant, it would become lawful to do so; if, indeed, the plan might not be perforce invested with a public interest. But this result would, and should, not be attained, if the constitutional amendment were in conflict with those provisions of the supreme law of the land, embodied in the Federal Constitution, which guarantee the citizen against the taking of his life, liberty or property without due process of law. The amendment of our Constitution does not, in terms, declare its object to be a public one. Indeed, I think that its language, by a fair reading, rather negatives such an inference and imports that the object is the private benefit of the landowner; for the purpose is stated to be the drainage only of his lands and he is to make just compensation for the land appropriated to that purpose. I conceive the proper rule of construction to be that, if the amendment expressed a purpose theretofore recognized as public, it would afford that sufficient sanction for subsequent legislation on the subject which might be needed. But, if the object has been theretofore deemed not of a public nature, or of public concern, and it touches some personal immunity secured by the law of the land, its presence in the Constitution will not have the effect of removing the fundamental objection to it. I do not believe that the people of the state can affect, or impair, the obligation of the social compact by adopting as a part of the organic law a provision which will permit of the taking of private property for a purpose, which is essentially of private benefit and which has always been held to be such. When the amendment says that "general laws may be passed permitting the owners and occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, etc.," it means that the legislature may authorize any such person to take another's land for a purely private purpose and that is in conflict with the inhibition of the Bill of Rights and violates the guarantees of the Federal Constitution. If the citizen invokes the guarantees of the Federal Constitution for his protection against the enforcement of a law, which an amendment of the State Constitution purports to authorize, I perceive no valid reason, if he is right in his claim to protection, that we should not recognize it. I am not able to resist the conclusion that the constitutional amendment in question is invalid and inoperative."

Wide as is the state power of taxation, still it is not utterly without limits; it can be exercised only for public ends. Taxation for

any other purpose would take property without due process of law, contrary to the Fourteenth Amendment.

*Brannon on the Fourteenth Amendment*, 1901, p. 160.

Upon the adoption of the Federal Constitution, the people thereby contracted each with the other that their agent, the state legislature, should pass no laws tending to tax them for any purpose which was not a public purpose. This they did to make secure to themselves as individuals their property rights, to prevent robbery under the guise of legality, to bar legislative action induced by influences socialistic or hysterical, and to enable them, the people, to retain their property whereby they might have the means to respond duly to the proper and just contributions which the state for its maintenance might require.

## 4. IT IS A FEDERAL QUESTION.

Constitution of Maine, Article IV, Part Third, section one, provides:—"The legislature shall convene on the first Wednesday of January, biennially, and shall have full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States."

It is clear that the Constitution of Maine does not permit its legislature to pass any act repugnant to the Constitution of the United States. The question in the case at bar therefore becomes one for interpretation by this court of the Fourteenth Amendment, which forbids the state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law.

*Brown* v. *Gerald*, 1905, 100 Me., 351, 373.

The Court in interpreting a corporate charter which gave the right of eminent domain said: "The legislature could not make a use public by declaring it such. The question, after all analyses, must come back to the inquiry whether the declared uses are in law public uses."

In *Lawton* v. *Steele*, 1894, 152 U. S. 133, Mr. Justice Brown said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

What is or is not a public use is a question of general jurisprudence which the Federal courts will determine for themselves.

*McGehee, Due Process of Law*, p. 230.
*See Guthrie, Fourteenth Amendment*, p. 44.

In *Fallbrook Irrigation District* v. *Bradley*, 1896, 164 U. S. 112, 159, the Court said:

"The Supreme court of California has held in a number of cases that the irrigation act is in accordance with the State Constitution, and that it does not deprive the landowners of any property without due process of law; that the use of the water for irrigating purposes under the provisions of the act is a public use, and the corporation organized by virtue of the act for the purpose of irrigation are public municipal corporations organized for the promotion of the prosperity and welfare of the people."

"We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law."

## 5. TAXATION.

"Taxation having for its only legitimate object the raising of money for public purposes and the proper needs of government; the exaction of monies from citizens for other purposes is not a proper exercise of this power and must therefore be unauthorized. An unlimited power * * * to make any and everything lawful which the legislature might see fit to call taxation would be when plainly stated an unlimited power to plunder the citizen. * * * Not only are certain expenditures absolutely essential to the continued existence of the government and the performance of its ordinary functions, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude or charity. The officers of government must be paid, the laws printed, roads constructed and public buildings erected; but with a view to the general well being of society, it may also be important that the children of the state should be educated, the poor kept from starvation, losses in the public service indemnified and incentives held out to faithful and fearless discharge of duty in the future by the payment of pensions to those who had been faithful public servants in the past."

*Cooley's Const. Limit.*, 696 *et seq.*

"In all the definitions of taxation and taxes one element appears most prominently, to wit: the necessity for a public purpose to justify the exercise of the taxing power. No principle of law is better established than this: that taxes can only be laid for public purposes; and that a tax laid for a private purpose or to bestow some private benefit upon some individual or individuals is void; regardless of the absence of express constitutional prohibition."

"The limitation upon the taxing power is based upon and derived from the inherent purposes of the state as a social organization. The state exists for the benefit of all; any devotion of its powers to merely private ends is such a perversion of its purposes and duties as to be utterly void; and it is the duty of the judicial agents of the state to protect the community from such a perversion."

*Gray on Limit. of Taxing Power and Pub. Indebtedness*, §169 *et seq.*

"One of the most important branches of the subject of taxation is in regard to the limits of the taxing power. In this country it is everywhere accompanied by the necessity that the tax shall be im-

posed for a public use. No state government nor that of the United States nor any other authority professing a regard for the rights of the people is at liberty to take money out of their pockets for any other than a public purpose. Whenever it can be discovered that a tax is levied for something that cannot properly be called such it may be successfully resisted by all the measures that the law allows in courts of justice."

*Miller on the Constitution of the U. S.*, p. 242.

It is beyond the legislative power by force of an enactment to make that a public purpose which is essentially private.

*Allen* v. *Jay*, 1872, 60 Me., 124, 136.

## 6. WHAT ARE PUBLIC PURPOSES.

The following have been held to be *public purposes* within the meaning of the constitution:—to pay expenses of a school controlled by a private corporation in consideration of gratuitous instruction of common school teachers; to purchase rights necessary to the beautification of public parks; to erect a bridge for highway and railway purposes; to aid in the building of a railroad; to make a county exhibit at the Omaha Exposition; to erect an electric lighting plant to furnish the city and individuals; to construct an underground street railway; to construct a subway to be leased to a street railway company; to provide bounties for killing coyotes; medical treatment for poor persons in time of epidemic; state exhibit at world's exposition; to provide for enlargement of millrace if it extends river and canal navigation to public street; disposal of sewage; to supply natural gas to the city and its citizens; to issue bonds to procure seed grain for the needy resident farmers, under a constitution authorizing counties to loan their aid for "necessary support of the poor"; to grant land to a private corporation for use as an Industrial Exhibition; to aid a water grist mill; to construct municipal water works; to construct a municipal electric light plant; to erect Brooklyn Bridge; to aid rapid transit railroad; to erect a soldiers' and sailors' memorial monument; to operate a municipal ferry; to operate a municipal gas plant; to erect a convention hall, in Oklahoma; and to erect public wharves on navigable waters.

## 7. WHAT ARE NOT PUBLIC PURPOSES.

The following have been held to be *not* public purposes within the meaning of the Constitution:—to provide free scholarships for needy students; treatment of habitual drunkards at a private institution; to aid an insolvent railroad with the provision that resident creditors shall be paid first; purchase and distribution of fuel to inhabitants; to pay part of tuition of pupils attending private academies; bounties for planting forest trees; maintenance and support of a G. A. R. Post; distributing water to private consumers; to pay men drafted and serving in the Civil War; to keep private fords clear of drift-wood; a bounty to private producers of beet sugar; to loan money to individuals to buy seed when crops have failed, in Minnesota; to aid benevolent and charitable societies controlled by private individuals; to loan money to persons who suffered from fire; to supply provisions and grain to farmers whose crops failed; to erect public sorghum mills; to supply light to individuals; to aid manufacturing enterprises; to aid a steam mill; to subscribe to a private corporation; to erect a dam, with privilege to devote it either to a public or private purpose; to erect an opera house; to refund money voluntarily contributed by individuals for levees; to erect a municipal brick-making plant; to engage in the business of plumbing; to operate a municipal ice plant, in Wisconsin; to construct a public hotel; and to engage in the business of selling coal.

## 8. THE CONDUCT OF PRIVATE BUSINESS IS NOT A PUBLIC PURPOSE AND IS UNCONSTITUTIONAL.

As to taxation for the purpose of *private business* enterprises, however important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means.

1 *Cooley on Taxation*, 1903, *p.* 206.

It would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing and selling goods in competition with individuals, with a view either to the profit that could be made through the income to be derived from the business or to the indirect gain that might result to the purchasers if prices were reduced by governmental competition.

*Nichols on Taxation in Mass.*, *p.* 49.

Government should never undertake the execution or *management* of nor extend aid to enterprises, the character of which as defined by the use of the term "private" is questionable. The fact that a government engages in an enterprise does not change this economic character from a purely private enterprise or business to a public one. Taxation for all such questionable enterprises by the government is universally considered not only unwise but unconstitutional and invalid.

1 *Abb. Mun. Corps.*, §304.

Municipalities cannot engage in private business.

*McQuillin on Municipal Corporations*, 1911, §359.

*State* v. *Switzler*, 1898, 143 Mo., 287.

In the course of discussing taxation for higher educational purposes, Gantt, C. J., said:

"Paternalism, whether state or federal, as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people upon the theory that the people are incapable of managing their own affairs, and is pernicious in its tendencies. In a word, it minimizes the citizen and maximizes the government.

Our federal and state governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government; a system in which the people are the sovereigns and the government their creature to carry out their ends. Such a government is founded on the willingness and the right of the people to take care of their own affairs and an indisposition on their part to look to the government for everything. The citizen is the unit. It is his province to support the government, and not the government's to support him. Under self-government we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. Paternalism is a plant that should receive no nourishment upon the soil of Missouri. * * Especially has the power of taxation been jealously hedged about and limited."

*Brooks* v. *Brooklyn*, 1910, 146 Iowa, 136.

The question was whether the town was authorized to construct an opera house, the town officers and place for the fire department being mere incidents to the building.

HELD: It was not within the power of the town to construct such a building. "The officials are not ordinarily selected to manage theatres or opera houses, and in view of the fact that when so managed the town becomes responsible for their care and safety and is liable to anyone injured by or through the neglect of any of the officials or employees of the city, it is a burden which should not be assumed. There was no need for such a building for municipal purposes, and it is but a thin disguise to cover a purpose not authorized by the law. The burdens of taxation are heavy enough without entering upon any such hazardous enterprises as are here proposed."

It appears from the opinion that the Iowa town government is by representation and not by town meeting, so that a large assembly hall is not necessary for municipal purposes.

*Baker* v. *City of Grand Rapids*, 1906, 142 Mich., 687.

Bill in equity to restrain maintenance of a *Coal Yard*. The plaintiff was a coal dealer and alleged that the city was unlawfully engaged in a commercial enterprise, the business of selling and dealing in coal, and was unlawfully using funds of the city for that purpose. The plaintiff also alleged that the city was conducting the business at great loss, was damaging his business, and that the money so used would enter into assessments for taxation and become a lien upon his

property. The defendant did not claim that it could enter into the business of dealing in coal commercially, but that under the existing emergencies, when coal and other fuel could not be procured, with a reasonable probability of a coal famine, it had the right to procure fuel to furnish to the needy poor and other citizens who could not procure it elsewhere.

HELD: "The city had the right through its board of poor commissioners to provide for needy citizens under the emergency, where a coal famine was imminent. A municipality, however, cannot enter into a commercial enterprise, such as buying and selling coal to its citizens as a business, thereby entering into competition with dealers in coal. Such use of monies is held *not* to be for a *public purpose.*

Affirmed in

*Opinion of Justices,* 155 Mass. 601.

*Opinion of Justices,* 182 Mass. 610."

This case, therefore, should be classified under the head of charity rather than under the head of a municipal fuel plant.

*Baker* v. *Grand Rapids,* 142 Mich. 687 is cited as one of the illustrations relating to §58 in Pond on Public Utilities, 1913, Mr. Pond says:—

"There is no occasion for such regulation or control over private business concerns engaged in individual enterprises, which operate singly and are naturally controlled by competition between the different business concerns providing the same commodity; and the courts have accordingly refused to sustain the attempts of municipalities to conduct a brick-making business, or to engage in the sale of coal and wood as fuel, or to assist private manufacturing concerns for the purpose of increasing the general business interests and prosperity of the particular municipality; and while, as we have already found, the municipal corporation will be permitted to use to the best advantage or to dispose of any surplus energy or capacity, which it may not need at the time for its own use, the courts will not permit the erection by a municipality of a building or the acquirement of a power plant primarily for private use and only incidentally for municipal purposes. To be valid, its chief use must be municipal and the disposition to private ends merely incidental. As this principle constitutes a well defined limitation on the power of municipal corporations in this connection, although its application has to do with enterprises of a private character as distinguished from those concerning municipal public utilities, a few cases will be noted by way of illustration of this principle of limitation as applied to matters which are not classified as municipal public utilities."

*Houlton* v. *City of Camilla*, 1910, 134 Ga., 560.

Petition for injunction by citizens and taxpayers of the City of Camilla enjoining the issuance of bonds authorized at an election held for that purpose. The bonds were to be issued for acquiring and equipping the electric and water works plant and system and to acquire, equip and operate an ice plant in connection with the water works, electric lights and other public utilities of the city of Camilla. The plaintiffs claimed that the city could not engage in the enterprise of operating an ice plant.

HELD, p. 566: "If a city has the right to furnish heat to its inhabitants because conducive to their health, comfort and convenience, we see no reason why they should not be permitted to furnish ice. The object in bringing by means of a water works system water in pipes from a distance for use in supplying the needs of the city is not alone to obtain a sufficient quantity, but also to secure that which is freer from impurities than it is possible to obtain in the city itself. If in the hot season of the year the inhabitant of the city must, for sanitary reasons, relinquish the cool draught from the well because as has been demonstrated wells of pure water cannot be maintained in populous communities, surely the city would have the right, were it practicable, to cool the water which it delivers through pipes as a substitute and which ofttimes is scarcely drinkable in its heated condition. If not practicable to cool it in the pipes, and if it be necessary to the welfare, comfort and convenience of the inhabitants that its temperature be lowered before being used for drinking purposes, why cannot the city provide for the delivery of a part of it in a condition to be used in cooling such part of the balance as is used for drinking purposes.

"The difference between water in liquid and a frozen condition is a radical one. Upon what principle could the doctrine be raised that liquid water may be delivered by the city to its inhabitants by its flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has the right to furnish its inhabitants with water in liquid form, we fail to see any reason why it cannot furnish it to them in a frozen condition."

The Court continues: "The defendant states that in the hot climate in which Camilla is situated, ice is necessary for the comfort, health and convenience of its inhabitants. We think the furnishing of ice is a municipal or public purpose. Nor do we see any rational objection on the idea that the city will be engaging in a manufacturing enterprise. The city might equally well be said to be manufacturing when by the use of a filtering process it changes impure water into that which is pure. When in connection with its water works system

it produces ice, it merely by certain process changes the form and temperature of a part of the water supplied by that system. We do not think the operation of an ice plant in connection with the water works system is in violation of the section of the constitution referred to or that it is illegal for any reason."

The answer to this may be found in the theory hereinafter suggested, that the use of the highways furnishes a criterion for the distinction between public and private uses. By this test, water would be clearly a public use, because the franchise or right to use the streets for the laying of pipes is a necessary incident to the distribution of water. On the other hand, ice to be delivered by wagons would need no special franchise or license, because it could not be delivered through pipes but would be delivered by wagons.

*State Ex Rel Muller* v. *Thompson*, 1912, 149 Wis. 488.

HELD: The question is whether the Home Rule Act, so called, laws of 1911 ch. 476 is constitutional. The Court below held in the affirmative. The proceeding was mandamus to coerce the clerk of the city of Milwaukee to submit to its electors under this law a proposed alteration of the city charter, the purpose of such election being to allow the city to conduct the business of furnishing its citizens with ice.

HELD: The law was unconstitutional, and the full bench sustained the motion to quash the alternative writ and to dismiss the mandamus action.

A portion of the Home Rule Act, so called, provides that every city is given authority to amend its charter and is granted all powers in relation to its form of government and to conduct *its municipal affairs* not in contravention of the Constitution. The first grant is a delegation of power to amend the charter. The second grant is to exercise all powers in the conduct of its municipal affairs not conflicting with the fundamental law. The second is subsidiary to the first and a limitation thereof in some respect.

P. 521. The Court distinguishes between water and ice, though the latter is but frozen water, also between coal and diamonds, although chemically identical.

P. 522. The manufacture, sale and distribution of ice was not a "municipal affair" because the municipality had never been by statute authorized to embark in such business. It could under the Constitution amend its charter relative to the conduct of its municipal affairs only, and this is not such an affair. The city could not make that a municipal affair which the state legislature had not made so.

This statute purports to confer no new or additional power on the city so as to make that a municipal affair which was not so before the enactment.

HELD: The proposed amendment to the Milwaukee charter is not within the purview of the statute in question, and if it were, the act would also be unconstitutional as a delegation of legislative power to an incident not warranted even by the most liberal interpretation of the Constitution.

*No. Dakota* v. *Nelson County,* 1890, 1 No. Dak. 88.

The constitution provided that no county should make donations to any individual, etc., *except for necessary support of the poor.* The Act of 1890 authorized counties to issue bonds to procure seed grain for needy farmers resident therein.

HELD: Constitutional, because the measure was intended for the necessary support of the poor.

It will be noticed in this case that the North Dakota Constitution contains a provision not in the Maine Constitution, "Except for the necessary support of the poor." This language was interpolated in the Constitution of only North and South Dakota, although otherwise the language is identical with seventeen other western states. It is evident from the opinion that the Court would have decided the other way but for this exception in the North Dakota Constitution. And in *Deering* v. *Peterson,* 75 Minn. 118, a similar statute was held to be *not* for a public purpose.

*City of Geneseo* v. *Gas Co.,* 1895, 55 Kan., 358.

The plaintiff municipality by authority of the voters conferred at a special election in 1888 subscribed for three thousand dollars of the capital stock of The Geneseo Natural Gas, Coal, Oil, Salt & Mineral Co. and issued bonds in payment therefor.

HELD: "The legislature did not and could not confer authority on the city to subscribe to the capital stock of this company. The business contemplated by the company's charter is not merely supplying the public want or performing a public function by the city authorities. In *State* v. *Hiawatha,* 53 Kan., 477, we held that the legislature had given authority to cities of the second class to purchase electric plants for lighting the streets. This corporation, however, seems to be formed for the purpose of carrying on a business of mining gas, coal, oil, salt and other minerals. It is formed not merely to supply a public need of the city, but contemplates carrying on a private business for profit. The main purpose of the corporation

would seem to be to produce minerals for sale on the market at a profit. *Cities are organized for public purposes, not to enter into private business ventures.* * * * The only statute which it is claimed authorizes such a subscription is Laws of 1887, Chap. 114, which, so far as it attempts to authorize cities to become shareholders in companies organized for the purpose of mining coal to be placed on the general market for profit, is void under the principles declared in former decisions of this court."

*Vail* v. *Attica,* 1899, 8 Kansas Appeals 668.

Suit on a bond issued by the defendant municipality; issued under an act of the legislature authorizing counties and incorporated cities to encourage the development of coal, natural gas and other resources of their localities by subscribing to the stock of companies organized for such purpose. Held upon the authority of *Geneseo* v. *Gas Co.,* 55 Kansas 358, that the law was unconstitutional and void.

*Keen* v. *Waycross,* 1897, 101 Ga., 588.

HELD: "The plaintiff as a citizen and taxpayer of the City of Waycross brought a bill to enjoin the municipal officers of the city through its water works commission, a co-ordinate branch of the city government, from entering into active competition with him in the plumbing business and selling plumber's supplies. Keen was licensed by the city to conduct his business.

The city contended that the plaintiff did not do skillful work, that it had become necessary for the water works commissioners to engage in the plumbing business in order to render the water works system efficient and self-sustaining."

HELD: "It appears that the city is conducting its plumbing establishment at a profit, but this can neither justify its unauthorized action nor afford any reason why it should not be enjoined from a lutely no authority of law have expended corporate funds in purfurther exercise of the powers it has usurped. Its officers with abso-chasing material and supplies with which to carry on this extra municipal enterprise, which action amounts in law to what is familiarly known as a misappropriation of trust funds."

*Pond on Pub. Utilities,* 1913, §63 quotes liberally from this case and says: "This case, conceding that the municipal corporation has the power to own and operate its water works system and take all necessary steps in order to render proper service in that connection, holds, however, that it was not necessary for the city to engage in the plumbing business for the reason that such service could be furnished

at the hands of private parties and that such power was never intended to be conferred upon the city."

*Hayward* v. *Redcliff*, 1894, 20 Col., 33.

HELD: A town may acquire and hold such real and personal property as may be necessary to enable it to carry on its corporate business and exercise its proper municipal functions; but it is idle to claim that a municipal corporation can lawfully engage in the business of buying and selling or dealing generally in real estate either as principal or broker. Held, accordingly, that an agreement to pay certain commissions for the sale of lots belonging to the town was void.

*Mauldin* v. *Greenville*, 1889, 33 S. C., 1.

Bill in equity by citizens and taxpayers against the city to restrain the city council from purchasing and operating an electric light plant to light the streets and public buildings of the city and from using the same for lighting private residences and places of business.

HELD: p. 21. The city charter of Greenville, as amended in 1885, 19 Statutes, 106, Sec. 12, provides that the council may purchase and hold any estate, real, personal or mixed, with full power and authority to make and establish all rules and ordinances respecting the roads, streets, market and police department of the city, for the security, welfare and convenience of the city, for preserving health, life and property therein and securing the business and good government of the same, etc.

(Page 22) The question is whether the city council had power to purchase and operate an electric light plant for the double purpose of lighting the streets and providing light to individuals for residences and business purposes. We hold that the purchase of the plant was not *ultra vires* and void so far as it was designed to produce electricity suitable for lighting the streets and public buildings of the city.

But we cannot so hold as to the purchase of so much of that plant as furnished light for residences and places of business, which cannot be properly included within the power to light the streets of the city. As we understand it all the powers given to the city council were for the sole and exclusive purpose of government, and not to enter into private business of any kind outside of the scope of the city government. In that very direction, especially in these latter times, is the dangerous and growing tendency of municipal corporations. It is very important for the interest of all to keep them strictly within the legitimate limits of their powers. The power given the city council

to issue bonds * * is a very high confidence and trust and can be properly used for no other purpose than "for the public use of the corporation," no matter how great the temptation may be. We cannot suppose that it was intended to give the city council as such the right to go into commerce, to buy for the purpose of selling again, or to enter into any private business or speculation whatever. As, for instance, if the city council owning horses in the discharge of their police duties should find it necessary to establish a blacksmith shop, we do not think they would be within their corporate duties to open it for the accommodation of the public, with or without compensation.

HELD: That the purchase by the city so far as it was to furnish light to private persons, with or without compensation, was *ultra vires*.

*Attorney General* v. *Detroit*, 1907, 150 Mich. 310.

HELD: The attorney-general filed this bill to enjoin the city of Detroit from using a fund raised by tax for the purpose of paying for the construction of a municipal plant for the manufacture of brick to be used in paving, for which a contract had been made with one Reich. The court below sustained the plaintiff and perpetually enjoined the city. The only question is whether the legislature has authorized the city to make such a contract.

We agree with the opinion of the circuit court that the power to engage in the business of brick-making is not included in the powers expressly granted to the city and that it is neither fairly implied in or incident to such powers as are expressly granted, nor is it indispensable or even essential to the declared objects and purposes of the corporation. While the law permits municipal corporations to do those things which are necessary to accomplish the objects of their creation, under an implication of power, the right has not usually been held to go so far as to permit them to engage in the manufacture of articles necessary to their lawful enterprises, where they are in common use and are to be had in the open market. Decree affirmed.

*Pond on Public Utilities*, 1913, §60, says this case "Illustrates the limitation placed upon municipal corporations, where the court refused them the right to enter the field of competition in private business undertakings. The addition to such an attempt being beyond their power, it was held to be both unnecessary and unfair to permit municipalities to engage in an ordinary private enterprise which competition controls and regulates, because in doing so it would operate to the disadvantage of the private citizen engaged in that line of business and finally result in his forced withdrawal from the business."

*People* v. *Salem*, 1870, 20 Mich. 452.

The Act of 1864 provided that towns might pledge their credit in the aid of the construction of a railroad and the town of Salem voted to aid to the extent of 5% of its assessed valuation. In order to render valid a burden imposed by the legislature under an exercise of the power of taxation it must appear that the tax is imposed for a public and not for a mere private purpose. In his opinion Mr. Justice Cooley said:

"I do not understand that the word public, when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the Legislature from taking broad views of state interest, necessity of policy, or from giving those views effect by means of the public revenues. Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people. To erect the public buildings, to compensate the public officers and to discharge the public debts, are not the sole purposes to which the public revenues may be applied, but, on the contrary, considerations of natural equity, gratitude and charity are never out of place when the general good of the whole people is in question, and may be kept in view in the imposition of the public burdens. The sovereign legislative authority must judge of the force of such considerations, on a general view of the just and proper demands upon the public treasury, and of the ability of the people to provide for all; and when that authority determines that such payments will subserve the public good, the responsibility of the legislator for the correctness of his judgment must be to the people whose representative he is, and upon whom the burdens he imposes must rest."

"But when we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and that in many cases it has little or nothing to do with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects for which the State imposes taxes upon its citizens, the question is always one of mere policy, and if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but

because on the whole it is deemed best by the public authorities that they should be. On the other hand certain things of absolute necessity to civilized Society is precluded, either by express constitutional provisions, or by necessary implication, from providing for at all; and they are left wholly to the fostering care of private enterprise and private liberality. We concede, for instance, that religion is essential, and that without it we should degenerate to barbarism and brutality; yet we prohibit the State from burdening the citizen with its support, and we content ourselves with recognizing and protecting its observance on secular grounds. Certain professions and occupations in life are also essential, but we have no authority to employ the public moneys to induce persons to enter them. The necessity may be pressing, and to supply it may be, in a certain sense, to accomplish a "public purpose"; but it is not a purpose for which the power of taxation may be employed. The public necessity for an educated and skillful physician in some particular locality may be great and pressing, yet if the people should be taxed to hire one to locate there, the common voice would exclaim that the public moneys were being devoted to a private purpose. The opening of a new street in a city or village may be of trifling public importance as compared with the location within it of some new business or manufacture; but while the right to pay out of the public funds for the one would be unquestionable, the other by common consent is classified as a private interest, which the public can aid as individuals if they see fit, while they are not permitted to employ the machinery of the government to that end. Indeed, the opening of a new street in the outskirts of a city is generally very much more a matter of private interest than of public concern; so much so that the owner of the land voluntarily throws it open to the public without compensation; yet even in a case where the public authorities did not regard the street of sufficient importance to induce their taking the necessary action to secure it, it would not be doubted that the moment they should consent to accept it as a gift, the street would at once become a public object and purpose, upon which the public funds might be expended with no more restrains upon the action of the authorities in that particular, than if it were the most prominent and essential thoroughfare of the city."

"By common consent also a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply. It is this in its natural operation, and without the interference of the government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of

any particular calling, the interference of the government is not tolerated, because, though it might be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term "public purposes" as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality."

"It creates a broad and manifest distinction—one in regard to which there need be neither doubt nor difficulty—between public works and private enterprises; between the public conveniences which it is the business of government to provide and those which private interest and competition will supply whenever the demand is sufficient. When we draw this line of distinction, we perceive immediately that the present case falls outside of it. It was at one time in this state deemed true policy that the government should supply railroad facilities to the traveling and commercial public, and while that policy prevailed, the right of taxation for the purpose was unquestionable. Our policy in that respect has changed; railroads are no longer public works, but private property; individuals and not the State own and control them for their own profit; the public may reap many and large benefits from them, and indeed are expected to do so, but only incidentally, and only as they might reap similar benefits from other modes of investing private capital. It is no longer recognized as proper or politic that the State should supply the means of locomotion by rail to the people, and this species of work is therefore remitted to the care of private enterprise, and cannot be aided by the public funds, any more than can any other private undertaking which in like manner falls outside the line of distinction indicated."

"It scarcely seems necessary to say that what the State as a political community cannot do, it cannot require the inferior municipalities to do. When the case is found to stand entirely outside the domain of taxation, State burdens and township burdens are alike precluded; no township vote and no township majority, however large, can affect the principle; any single individual has a right to insist that the public do not own or control his property for the purpose of donations."

*Abbott on Public Securities*, §101.

The purpose for which the indebtedness is created should be public.

There is found as an implied and inherent limitation on the power of every public corporation to create a debt the one, namely, that the purpose for which it may be contracted or the use the funds realized shall be put must be public in their character. This limitation impliedly and inherently exists, based upon the difference between a public and a private corporation. A public corporation is an agency of the government, an aid to the sovereign in carrying out its purposes and duties which are public in their nature, and intending to protect and benefit society at large, the community rather than the individual. If the individual is benefited by the establishment and maintenance of an organized government, it is not because of the purpose to directly accomplish that result, but because the individual indirectly and as a member of a community or society participates in the benefits and advantages of that government. Of certain of these powers there can be no question of the character. The exercise of the police power, the maintenance of government, the construction of public buildings, the provision for a system of public education, and others, are clearly recognized. Other acts may be recognized as not belonging to this category, and there are still others which it is difficult sometimes to assign to either class and which lie along the dividing line between the two. It is clearly beyond the power of a public corporation in the State to appropriate public money for private purposes, or to expend public moneys for the personal advantage and benefit of private individuals or *personal and private enterprises,* such funds being raised from a system of public taxation designed for the benefit and advantage of the public at large, the legality of the system based upon the idea that the use of the proceeds shall be public. There is no controversy about the soundness of this opinion; the dispute arises in its application.

"What is or is not a public purpose has been considered by the courts in many cases where there has been a questionable expenditure of public moneys for purposes which result directly to the good, benefit, and advantage of the community, and yet, which should not be permitted because contrary to that broad and underlying principle that sufficient purposes can be found, in respect to which there is no doubt, for the use of all funds raised by taxation, and not creating an excessive burden upon the taxpayer, without expending public funds for purchases as to the character of which grave doubts arise. However desirable or just it may seem that a questionable, in this respect, use of moneys should be made, the safest and in fact the only public policy to be pursued is the one above indicated, and the rule of strict construction applied in the incurring of indebtedness in all its vigor and severity.

"The character of certain uses for which public moneys may be expended is established beyond question, as well as certain purposes to which they shall not be put. It is imposisble to give an exact definition of public purpose. Whether the purpose is a public one for the expenditure of moneys is a question exclusively for the courts to determine. Leigslative bodies cannot be the judges of their own infraction of fundamental laws."

*State v. Guilbert*, 1897, 56 Ohio State, 575.

HELD: The Act of 1896 whereby the state should become an insurer of titles is unconstitutional.

"That this is in no sense a public purpose seems clear. Considering the purposes for which government is instituted and the high conception of individual right which prevailed at the time of the adoption of the constitution, it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles. No such authority is implied in any of the terms of the constitution. It is not implied in any of the enumerated purposes for which government is formed. It is entirely foreign to those purposes. The legislature may by law authorize the organization of corporations for the purpose of carrying on the business of insurance, but this grant of power is rather an implied negation of its authority to conduct such business itself."

"The functions of the state are governmental only. Its powers are embraced within the three familiar divisions of legislative, judicial and executive. He who affirms the existence of the power in question must be able to find it embraced in one of these divisions. And since the insuring of titles does not essentially differ from any other insurance, nor indeed from any other business or occupation, he must find authority in whose exercise the state may become the competitor of the citizen in every vocation."

*State ex rel Toledo* v. *Lynch*, 1913, 88 Ohio State, 71.

Under the amendment to the state constitution adopted September, 1912, relating to local government in municipalities, they were given authority to exercise all powers of local self government. Under this charter the city appropriated $1,000 for the establishment of a moving picture theatre. The defendant, the city auditor, refused to take the proper action to appropriate this sum and petition for mandamus was brought. HELD: Shauck, C. J.,—we understand it to be conceded that prior to the adoption of the constitutional amendment municipalities were without authority to use public money to

establish and operate moving picture shows. "As the City of Toledo has existed and flourished from its founding without a municipally owned attraction of that character, the declaration of the second section of the Ordinance that it is an emergency measure must be taken to mean that it is a measure for which there is now supposed to be opportunity."

"But the case before us presents the question whether the establishment and operation of a moving picture show is within "the powers of local self government," and the question has received the attention of able counsel. In the amendment the phrase is used without definition and with the manifest intent that its operation shall be according to its established meaning. It is fundamental in interpretation that statutes in derogation of the common law and amendments to statutes and constitutions shall have such and only such operation as is due to the natural import of their terms. The effective search for truth as well as the decorum due the convention and the people by whom the amendment was framed and adopted requires us to impute to them a knowledge of that fundamental and familiar rule, and also to assume that they expected the courts to apply it to their work. Since municipalities get their powers from the state, it is mathematically certain that they can include no power not possessed by the state. Local self government is necessarily a part of government less than the whole."

"In *State, ex rel.,* v. *Guilbert,* 56 Ohio St., 575, we recognized the truth familiar to all constitutional lawyers, that the functions of the state are governmental only, except so far as proprietary rights may become incident to the exercise of the primary function, and that since the insuring of titles does not essentially differ from any other insurance or business, the state cannot enter upon the business of insurance. How little would remain of the assurance which the Bill of Rights gives to minorities as well as to majorities that: 'All men * * * have certain inalienable rights, among which are those of * * * acquiring, possessing and protecting property,' and that private property may be taken only for uses which are public, if the proceeds of industry and thrift may be seized for the establishment and operation of moving picture shows and all other imaginable purposes not more frivolous nor more remote from the functions of government."

"Consciousness of inadequate prevision forbids an attempt at a conceptual definition of the phrase 'all powers of local self government' to be applied to all cases that might arise. But an obviously correct descriptive definition is sufficient for the case in hand. They are such powers of government as, in view of their nature and the field of their

operation, are local and municipal in character. The force of the terms employed requires the inclusion of such powers to be exercised by officials who in some manner and to some extent represent the sovereignty of the people. It as clearly excludes the exercise of functions which are appropriately exercised by caterers and impresarios. The suggestion that moving picture exhibitions might be made educational is gratuitous because that is not their natural object. It is unavailing because Article VI of the Constitution shows that education supported by taxation is to be conducted by a system of common schools throughout the state."

"Among those who had attentively studied the functions of written constitutions it was accepted as a sound proposition that a municipality might own and operate only such utilities as it used in its municipal operations. Those who are responsible for this amendment were aware that no enlargement of that capacity was denoted by the provisions of the third section that 'municipalities shall have authority to exercise all powers of local self government,' and, therefore, they employed the express language of the later section of the article to confer that capacity with respect to other utilities. And as to them there are provisions to safeguard the interests of the people, while capacity to operate amusements, if conferred at all, is conferred without restriction. If the language of this instrument were so doubtful as to require construction, a most natural question would occur, and the answer to it would be inevitable: Could we rationally impute an intention to authorize such use of the public money to those who were seeking to reduce the cost of municipal government and the consequent burdens of taxation?"

"The conclusion that this would be an unauthorized use of public money seems clearly to result from these considerations."

Mr. Justice Wilkin, concurring, said: "For aught that appears, the theatre may be operated purely for gain, in competition with private persons or companies in the same business. And for what purpose or whose benefit the profits will be used, the promoters of this new departure in municipal government have not disclosed. The business may be conducted by the council as a monopoly, to destroy the business of private owners of picture shows. If the city council may thus drive out the picture shows, then why not the barbers, the laundries, the bakeshops, groceries, music teachers, coal dealers, drug stores, newspapers, and so on ad infinitum? All these concern the public health, morals and well-being more intimately than exhibitions of moving pictures for popular entertainment."

"The city is still governed by the first method—under general laws of the state. The maintenance of moving picture theatres is not a

function of municipal government authorized by the General Code."

"The question has been mooted and debated in this case, whether the maintenance and management of moving picture shows is a legitimate function of municipal government. This question would better be raised on a different record than the one before us. But it has been pressed upon us as one fairly arising upon the facts of the case. As defined by this record, the moving picture theatre must be understood according to the common acceptation—a business for profit. It may be for loss. Public revenue may not be raised nor expended in that way. This is not a function of constitutional government in Ohio. The kinetoscope may be used at some time, in some way, in the proper management of municipal affairs and for the public weal. But the moving picture show business, as defined, or rather undefined, in this ordinance, is not a fair instance of such a use. Upon the record before us, it is, to say the least, prima facie ultra vires of the municipal council."

"The relator has failed to show us that such a use of public funds in a business of profit or loss, in competition with private enterprise, is a function of government, so far as the people of Ohio have as yet, during one hundred and ten years of statehood, by their courts or in their constitution or the recent amendments thereto, defined their theory and practice of government."

"By entitling this amendment 'Home Rule,' did the revisers of the Constitution indicate more than a redistribution of some powers of government, shifting all legislation in local affairs from the general assembly of the state to the electorate of incorporated urban communities? Or did they indicate a change of the essential nature of government from the free American plan of individualism toward the foreign cults of communism and paternalism? To the people of Ohio who adopted it, 'Home Rule' signified the former change rather than the latter. We are aware that the regulation of the intensely complex and highly artificial life of great modern cities is a problem of practical sense and skill rather than of philosophic theory. Probably the ideal system of municipal management is a composite form of individualism modified as to certain communal interests by paternal favor and oversight. The evolution of modern city government seems to be toward that ideal. We do not seek to retard it."

"This court is not dealing with *a priori* theory. Our province is to interpret a formal fact and to deduce its meaning from the document in which it is couched. True, we may view the fact in the historical perspective, but only to find its genesis in the common law of the land; as Coke says: 'Out of the old fields springeth the new corn.' Our question is: Does the Document embody a quiet revolution or a

social evolution? The latter, we think. It is not a new constitution, but a modification of the old. Nowhere in the original constitution of Ohio, nor probably in any of the last-century state charters, can we find the power of taxation employed for competitive enterprise in the hazard of profit and loss, or that such an enterprise is within the sphere of constitutional government according to the American idea. If the people of Ohio meant to depart so radically from the ancient landmarks, they should and would have used proper language to convey that meaning."

"Sections 4, 5 and 6 of Article XVIII, empower municipalities to acquire and operate certain designated public utilities. No claim is made that the business of moving picture theatres is included in this additional grant of power; theatres are not 'utilities' and are not mentioned in the grant. Expressio unius exclusio alterius est."

"What is the proper range of government is not a legal but a political question to be decided by the people. It cannot be solved by speculation, but must ever lie open to the teaching of experience and history. But that the people of Ohio on September 3d last voted to make their state a political laboratory in which every village and city may, at the behest of the council, with funds raised by taxation, experiment in every variety of trade or business, as private persons do, is the proposition urged upon us by the advocates for the relator. We must be allowed at least to doubt the soundness of this construction of Article XVIII of the amendments. The rule of law is that the grant of powers to corporate bodies, purely the creatures of law and the agents of the state, is to be strictly construed, and if the grant does not clearly include the power in question, it must be denied. The natural development and safe progress of society, require that the expounders of its constitution shall be cautious—without, of course, being obstructive."

"The great and extraordinary writ of mandamus should never issue, unless the right to it is strong and clear and the motives for seeking it are just and lawful, and above suspicion or reasonable doubt. The writ should be refused."

Mr. Justice Donahue, concurring, said: "I do not believe that governmental purposes include only the protection of life, liberty and property. On the contrary, I am firmly of the opinion that one of the most important duties of the State is to promote the health, convenience, comfort and welfare of its citizens and advance the standard of citizenship in every legitimate way. But I do not believe it is within the purview of municipal government to invade the sphere of purely private enterprise wholly disconnected and divorced from public needs or public purposes. It is difficult, perhaps almost im-

possible, to prescribe a limit where governmental functions end and private enterprise begins. In the last quarter of a century our views on this subject have so changed that a limit fixed along the line of the prevailing opinion on that subject at that time would seem absurd now, and so it may be a quarter of a century hence."

"As an index to what has been generally understood to be comprehended in the term 'governmental powers,' it is interesting to note that the general assembly of the state has heretofore conferred upon municipalities by statute the power to own and operate municipal lighting, power and heating plants; to provide for water supply, public grounds, parks and recreation centers; to hold property for charitable purposes; to establish municipal lodging houses, public baths and bath houses; to prevent the sale and distribution of vicious literature; to provide public libraries and reading rooms, to purchase books, papers, maps and manuscripts therefor, and to receive gifts and bequests of money for that purpose; and to maintain and regulate public band concerts. In addition to this, authority has been granted to municipalities to construct railroads; also to fill and improve lands for terminal facilities; to empower municipalities to erect machine shops and issue bonds to pay for them; also to construct glass works."

## 9. MAINE DECISIONS.

*Bussey* v. *Gilmore*, 1824, 3 Me. 191, 197. HELD,—under the old Massachusetts Statute of 1785 empowering towns to raise money for certain specific purposes, and "other necessary charges," the town of Bangor has no authority to contract with a Bridge Company to pay an annual amount to the Bridge Company in purchase of the immunity from toll of its citizens. "The privilege purchased by the contract was valuable to many of the citizens in their individual capacity, but the town had no *corporate* interest to be promoted by the immunity."

*Opinion of Justices*, 1871, 58 Me. 590.

The House of Representatives inquired of this court whether the legislature had authority under the Constitution to pass laws enabling towns, by gifts of money or loans of bonds, to assist individuals or corporations to establish or carry on manufacturing of various kinds, within or without the limits of said town; and if towns thus authorized may assist the private parties, may they go further and establish manufactories entirely on their own account and run them by the ordinary town officers or otherwise.

The Justices replied:

"As the proposed gifts can only be raised by taxation, the question really is, can the legislature constitutionally authorize towns to assess taxes upon their inhabitants and collect the same, for the purpose of giving the proceeds to some favored manufacturer or manufacturing corporation. And as some of the inhabitants may be indisposed to such generosity, the inquiry will arise, whether the legislature can authorize the majority by vote to give away the estates of the minority or any portions thereof, not merely without but against their consent?

"Taxation, by the very meaning of the word, is for public purposes, and for those the right of the government to impose taxes is unlimited. Taxes are the enforced proportional contribution of each citizen and of his estate, levied by the authority of the State for the support of government and for all public needs. They are the property of the citizen, taken from the citizen by the government, and they are to be disposed of by it.

"Now the individual or corporate manufacturing will in the outset promise to be, and in the result will be, either a judicious and gainful undertaking, or an injudicious and losing one. If the manu-

facturing be gainful, there seems to be no public purpose to be accomplished by assessing a tax on reluctant citizens and coercing its collection to swell the gains of successful enterprise. If the business be a losing one, it is not readily perceived what public or governmental purpose is attained by taxing those who would have received no share of the profits, to pay for the loss of an unprosperous manufacturer, whether arising from folly, incapacity, or other cause. The tax-payer should not be compelled to pay for the loss when he is denied a share of the profit.

"It is true the inquiry is, whether the legislature can authorize a town by a major or any vote to give away the property of an unwilling minority to an individual or manufacturing corporation whom or which such majority may select as donees. The question relates only to manufactures; but if the right of confiscating the private property of individuals for the purpose of giving it away to one branch of industry can be conferred upon towns, one does not easily see when or what bonds can be imposed or limitations made.

"The constitution provides that 'private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it.' But here the question is, whether private property can be taken for private purposes without just or any compensation. No public exigency can require private spoliation for the private benefits of favored individuals. If the citizen is protected in his property by the constitution against the public, much more is he against private rapacity. If the public cannot take private property against the consent of the owner without just compensation, and only when it is required by some public exigency, most assuredly private property cannot be taken for private purposes without just or any compensation, and when it is not needed to meet any public exigency.

"May towns 'establish manufactories entirely on their own account, and run them by the ordinary town officers or otherwise?'

"Towns were a part of the political organization of New England long before the formation of the constitution of this state. They are created by the government for specific purposes. They are a part of it. They are among its most efficient instrumentalities in carrying out successfully the objects of its very existence. Through their agencies the taxes required for the needs of the state are raised. Extensive powers are conferred on these corporations,—but they are public corporations for public purposes. They may purchase or build town-houses, where the meetings of the inhabitants are to be held; school-houses, where the youth are to receive instruction; poor-houses, where the pauper is to be supported, police stations, where

the criminal may be temporarily restrained,—for these are among the recognized functions of government. So, in case of insurrection or war, they may coöperate with the general government in suppressing the one or in bringing the other to a successful termination. These are only among the illustrations of the exercise of corporate powers and duties. Towns are public corporations, created and existing only for public purposes, not private corporations for the purpose of traffic or manufacturing.

"The entering into contract is a consensual act. The formation of a partnership is a contract. The consent of the partners is necessary thereto. The legislature could not, by any statute, compel individuals without their consent to be partners and to assume the liabilities of partnership, and give the control of the funds to those who do not, and take it from those who do furnish the capital. But giving the town authority to establish manufactories is thus coercing a partnership. It is despotically taking the control of capital from its owners and transferring it to others. It is enabling the majority of a town to incur unlimited indebtedness. If the towns can embark in manufacturing, they can create a partnership, by which all the property of the inhabitants is pledged to meet the contingencies of business. If they can embark in manufacturing, why not in mercantile pursuits of any and every description? What conceivable limits are there to the spirit of reckless speculation, especially when those without means may have the power to dispose of and control the estates of those who have?

"If it were the special object to lessen industry, to diminish capital and to prevent its increase, the most sure and effective mode to accomplish the result,—there could be none more so,—would be to withdraw the control of capital from its owners and to transfer its management to others, thus creating the greatest possible insecurity. The more numerous the body of men controlling its use and employment, the greater the chances of mismanagement, fraud, waste, and consequent loss. The less the state interferes with industry, the less it directs and selects the channels of enterprise, the better. There is no safer rule than to leave to individuals the management of their own affairs. Every individual knows best where to direct his labor, every capitalist where to invest his capital. If it were not so, as a general rule, guardians should be appointed, and who would guard the guardians?

"To give the power suggested would be to enable the majority, according to their own will and pleasure, to give, lend, and invest the capital of others, and to the extent of the power exercised, it would be to deprive the owners of the ability to give, lend, or invest their

own funds. Let this be done, and the remaining rights of property would be hardly worth the preserving.

"To do this, would be to impair or take away the inherent and unalienable right of 'acquiring, possessing and protecting property;' to deprive men of their property neither 'by the judgment of their peers' nor 'by the law of the land;' to take private property, not for public but for private uses, without compensation, and to undermine the very foundations upon which all good governments rest.

"We, therefore, answer the questions proposed in the negative." The court's opinion was signed by Messrs. Justices Appleton, Walton and Danforth. Messrs. Justices Kent and Tapley concurred by answering briefly in the negative. Mr. Justice Cutting felt that the questions ought not to be answered until an aggrieved party in a court of law or equity should appear and show that the acts were unconstitutional. Mr. Justice Dickerson at p. 603 says the question may be reduced to this: "Has the legislature the constitutional authority to authorize towns and cities in this state to tax their inhabitants for the purpose of aiding, establishing or carrying on, not only manufacturing, properly so called, but also farming, shipbuilding, trading, inn keeping, printing, banking, insurance and any other branch of beneficial industry," and he answers these questions in the negative.

Mr. Justice Barrows, in an elaborate opinion, said, p. 609:—"In testing the constitutionality of a law imposing a public burden, the naked question is, is the object one of those which the government was instituted to provide for according to the terms of the compact into which the people entered when they formed their Constitution, or is it one which by long settled usage has been left to be fostered by private enterprise, industry and liberality, because its profits flowed directly into the pockets of private individuals or corporations, and the benefit which it confers on the community is only incidental and secondary? If it falls within the latter class, it is without the pale of constitutional legislation."

"We are now to consider the question of the constitutional validity of the class of proposed acts referred to in your second question,—acts authorizing towns to establish manufactures on their own account, and run them by the ordinary town officers or otherwise. It seems hardly possible that any one will be found to affirm that undertakings of this description can, by even the greatest latitude of construction, be included among the objects for which the government, and the power to raise money by taxation to meet the wants and accomplish the aims of the government, were created. What has been already said about the invalidity of assessments made for any other

than the legitimate purposes of government applies to the legislation referred to in the second question.

"But I answer both these questions in the negative, because such legislation would be utterly subversive of so much of Art. 1, §1, of the constitution as affirms the right of our citizens as individuals to acquire, possess, and protect property,—a right which may be conveniently designated as the right of private property.

"Taxation, however heavy, if limited to the objects which the government was instituted to secure, does not infringe this right, because its very existence depends upon the maintenance of civil government; but taxation for any other purpose is a practical denial of the right, and a handing over of every man's property to those who can command a majority of the votes in his state or precinct.

"It seems unnecessary to elaborate or illustrate these positions, or to attempt to prove the self-evident proposition that government was not instituted for the purpose of engaging in manufactures or trade.

"What must necessarily be the effect of this proposed intrusion of municipal organization, backed by the power of taxation, into the field which immemorial usage has hitherto reserved to private energy and enterprise? What private operator could venture to compete with those who should be made the recipients of the public favor, or with the municipality in which he lives controlling all the property taxable in that precinct, for the support of its own operations in the same line? Government monopolies in manufactures and trade have sometimes existed in despotic or semi-despotic governments; but the inevitable effect of them is 'to relax the springs of exertion and enterprise.'

"It is true it may be said that this consideration bears upon the expediency rather than upon the constitutionality of these schemes: but behind this stands the fatal objection to any legislation of the description proposed, that when you compel a man to contribute, at the fiat of a town meeting, to objects other than those which the government was framed to secure, you destroy his constitutional right to possess and protect property, which he can thereafterwards only hold subject to the determination of a majority of his townspeople.

"The people of Maine have not yet adopted a constitution which, upon any reasonable interpretation, makes the tenure of private property so uncertain."

In *Libby* v. *Portland*, 1909, 105 Me. 370, the court discusses the liability of the city for damages arising from defective conditions in a building conducted as a city farm. Incidentally, the court said: "It may be considered admitted that a city or town would not have

the right to raise money by taxation for the purchase of such a farm any more than for the establishing of manufactories, or for the erection of buildings for the purpose of renting them as stores, or banks or halls."

*Citing Opinion of Justices,* 58 Me. 590.

In *Laughlin* v. *Portland,* 1914, 111 Me., 486, however, a question arose identical with that in the case at bar predicated only upon the Constitution of the State of Maine, but the precise point involved was the determination whether this purpose was public or private. The Court in that case held that this purpose was public. At p. 495 the Court mentions a distinction contended for by the petitioners in that case, a distinction or criterion between any cases of public and private uses, and says: "They (the petitioners) say that in the case of distribution of water, and of light and heat by gas or electricity, the use of public highways is required for the mains and poles and wires, that the purpose is public because it is necessary to obtain permission from the public authorities, either state or municipal, in order to carry it out. We grant that in those cases this element of public permission exists, but it does not follow that the converse is true and that no purpose is public where such permission does not exist. How can this criterion be applied to the erection of public buildings, the erection of a park, the building of a Memorial Hall, or of a market house, or the maintenance of a public clock?"

We admit that this criterion, which is set forth in the eleventh subdivision of this brief, cannot be applied, either one way or the other, to public buildings, parks, Memorial Halls, market houses or public clocks, but we have had pointed out to us no reason why this criterion so called might not be received for consideration in the case of that class of activities to which it does apply.

Again, the opinion in the case of *Laughlin* v. *Portland,* sup., makes no reference to *Keen* v. *Waycross,* 1897, 101 Ga., 588, sup., where it was held that the city could *not* engage in the plumbing business. The Laughlin case referred with approval to *Houlton* v. *Camilla,* 1910, 134 Ga., 560, which decided that the city might operate a municipal ice plant. The Laughlin case did not refer to or comment upon the case of *State* v. *Thompson,* 1912, 149 Wis., 488, decided two years later than the Houlton case, but holding that the city could *not* operate a municipal ice plant to furnish its citizens with ice. The opinion in the Laughlin case contains no reference to authoritative statements in Cooley's Constitutional Limitations, Pond on Public Utilities, Judson on Taxation, Abbott on Public Securties, Nichols on Taxation in Massachusetts, or Gray on the Limitation of Taxing

Power and Public Indebtedness, all of which are modern authorities unanimously of the opinion that a municipality cannot engage in the business of selling coal to its citizens.

On the ground that Opinions of the Justices, answering questions propounded by the Legislature, are of less value than decisions in cases coming before the court, the opinion in the Laughlin case seeks to belittle the force of exprssions in the Opinions of the Justices, both in Maine and Massachusetts. And yet in Massachusetts the Court in its Opinions of the Justices and in cases regularly brought before it had occasion to express itself seven times in the twenty years from 1892 to 1912, and that Court neither questioned nor varied the soundness of its judgment as expressed in the Opinions of the Justices. In Maine, prior to the Laughlin case, there had been an Opinion by the Justices in 1871, and this was the only opportunity which our Court had to express its views upon this point until the case of *Libby* v. *Portland* in 1909, when it cited with approval the earlier Opinion of the Justices. While there may be some force in the idea that opinions given to the Legislature are entitled to less weight than expressions which are the outcome of the course of litigation, such weight as there is to such expressions, certainly in both Massachusetts and Maine, until the decision of the Laughlin case, quite outweighed any authoritative expression favoring the right of a municipality to engage in private business.

The decision in *Laughlin* v. *Portland* surely opens the door so that the municipality may enter upon all kinds of commercial business "which measure upon to either of the accepted tests." If the commodity to be dealt in "enables the citizens to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole," then, under this decision, it would be a proper kind of commercial business for the municipality to undertake. The Court in that case said at this point, "In our opinion it is a proper and constitutional function of government either to itself provide such a necessity under these circumstances or to see to it that it is so provided as to bring it within the reach of the citizens."

The case at bar, it will be remembered, is free from the influences of panic, famine, strike, riot, war, or any other emergency. It was brought in May, 1914. It has no concern with the requirements of a country at war. It is essentially and exclusively a question relating to the normal conditions of peace. It is, so far as the municipality is concerned, a business proposition, though without profit, but not a matter which has charity, education or police regulation for its ex-

cuse. To those jurists whose opinions have been accepted as wise and conservative, it has invariably seemed the better course to pursue to employ existing legitimate means rather than to destroy the framework of an existing system. There is a method, of course, by which a municipality may be duly authorized to engage in private business. Such a method was recently suggested in both New York and Massachusetts, where it was recommended that there be constitutional amendments permitting the municipality to engage commercially in the business of coal. To amend the Federal and State Constitutions and under them to enact laws not inconsistent, is the only proper method for authorizing municipalities to carry on such business, and if the popular demand be sufficient there would seem to be no reason why this might not be accomplished. In such event it would be done in an orderly and proper manner consistent with the functions of government as we have been hitherto lead to believe they existed. It would seem wiser to proceed rationally than to revolutionize the powers of government already granted and vested in the municipalities and up to this time recognized as having certain just and settled limitations.

## 10. MUNICIPAL FUEL PLANT DECISIONS IN MASSACHUSETTS.

The right of a municipality to establish and operate a municipal fuel plant has been directly considered in a few cases. The question first arose in 1892 in the *Opinion of Justices*, 155 Mass. 598. The House of Representatives transmitted questions to the court relative to "an act to enable cities and towns to purchase, sell and distribute fuel." Of the three similar questions asked, the most comprehensive was the third: "Is it within the constitutional power of the legislature to enact a law conferring upon cities and towns within this commonwealth authority to establish and maintain municipal fuel or coal yards for the purpose of selling coal, wood, or other fuel to the inhabitants of said cities and towns."

The Justices said:—"Whether the Legislature can authorize a city or town to buy coal and wood, and to sell them to its inhabitants for fuel, must be determined by considering whether the carrying on of such a business for the benefit of the inhabitants can be regarded as a public service. This inquiry underlies all the questions on which our opinion is required. If such a business is to be carried on, it must be with money raised by taxation. It is settled that the Legislature can authorize a city or town to tax its inhabitants only for public purposes. This is not only the law of this Commonwealth, but of the States generally and of the United States.

"We know of nothing in the history of the adoption of the Constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established. There are nowhere in the Constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at the time when the Constitution was adopted was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The object of the Constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the Commonwealth or the 'towns, parishes, precincts, and other bodies politic' to undertake what had usually been left to the private enterprise of individuals.

"The early usages of towns undoubtedly did not exhaust the authority which the Legislature can confer upon municipalities to levy

taxes. Cities and towns, since the adoption of the Constitution, have been authorized to levy taxes for many other purposes than those for which taxes were then levied. Up to the present time, however, none of the purposes for which cities and towns have been authorized to raise money has included anything in the nature of what is commonly called trade or commercial business.

"We do not find either in the Colony or the Province laws any legislation relating to the buying and selling of coal or wood by towns for the use of the inhabitants, or any legislation on any similar subject. It is possible that there may be found in the records of some town a vote or votes showing that the town in an emergency was authorized to buy wood or coal for the purpose of supplying its inhabitants with fuel, but we have not found any. Certainly it was not usual for towns to supply their inhabitants with fuel, unless they were paupers.

"But when the Constitution was adopted, the buying and selling of wood and coal for fuel was a well known form of private business, which was generally carried on as other kinds of business were carried on; and is now carried on in much the same manner as it was then. It was and is a kind of business which in its relations to the community did not and does not differ essentially from the business of buying and selling any other of the necessities of life. Although all kinds of business may be regulated by the Legislature, yet to buy and sell coal and wood for fuel requires no authority from the Legislature, and requires the exercise of no powers derived from the Legislature, and every person who chooses can engage in it in the same manner as in the buying and selling of other merchandise. We are not aware of any necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprise, and we are not called upon to consider what extraordinary powers the Commonwealth may exercise, or may authorize cities and towns to exercise, in extraordinary exigencies for the safety of the State or the welfare of the inhabitants. If there be any advantage to the inhabitants in buying and selling coal and wood for fuel at the risk of the community on a large scale, and on what has been called the co-operative plan, we are of the opinion that the Constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which cities and towns may be authorized to tax their inhabitants.

"We therefore answer the questions in the negative."

The foregoing was the opinion of five of the justices. Mr. Justice Holmes, then a member of that Court, was of opinion that a purpose

is public when the article is wood or coal as when it is water, gas or electricity. Mr. Justice Barker agreed with the majority that it was not within the constitutional power to engage in trade manufacturing merely for the purpose of having any branch of business conducted upon a convenient or economic plan. He did express the opinion, however, that in case of famine it would be within the constitutional right to create agencies for this purpose, and he added: "If, on the other hand, there is no want of adequate service, the legislature has no constitutional right to create agencies for the purpose. It has no right to authorize towns and cities to engage in trade merely to try an experiment in practical economics or to put in practice a theory."

This opinion of the Justices, 155 Mass. 598 is cited with approval by the court in *Prince* v. *Crocker,* 1896, 166 Mass. 347, 361 where the court says: "That the legislature can authorize a city or town to tax its inhabitants only for public purposes is well settled and familiar."

In January, 1903, the House of Representatives in Massachusetts again asked the opinion of the justices in regard to the establishment and operation of a municipal fuel plant,—*Opinion of Justices,* 182 Mass. 605. The questions asked in 1903 were identical with those asked in 1892, except that in regard to each question the inquiry was whether fuel could be sold at cost, or at less than cost, or at a profit. Appended to these questions was a fourth "If the answer to any of the foregoing questions be in the negative, does the power so declared as non-existent exist in the case of extraordinary emergency, and may different cities and towns be constituted judges of said emergency."

Six members of the court replied stating that they *adopted* and *reaffirmed* the doctrine stated in the majority opinion given in 1892, 155 Mass. 601. The Court said:

"We do not deem it necessary to restate the reasons and arguments which have led legislatures and courts to nearly, if not quite, uniform conclusions in regard to the attitude which the government should maintain, under existing constitutions, towards the transaction of common kinds of business which can be conducted successfully by individuals, without the use of any governmental function.

"It is established that under our Constitution private property cannot be taken from its owner except for a public use. This is equally true whether the property is a dwelling house taken by right of eminent domain, or money demanded by the tax collector. The establishment of a business like the buying and selling of fuel requires the expenditure of money. If this is done by an agency of the government there is no way to obtain the money except by taxa-

tion. Money cannot be raised by taxation except for a public use.

"Until within a few years it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the State to enter as a competitor into the field of industrial enterprise, with a view either to the profit that could be made through the income to be derived from the business, or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes, for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for if the coal yard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provisions and clothing, and other necessaries of life, were taken up by the government; and men who earn a livelihood as proprietors would be forced to work as employees in stores and shops conducted by the public authorities.

"Except for the severely onerous conditions from which we are now suffering, the causes of which arose outside of this State beyond the reach of our legislative enactments, there is nothing materially different between the proposed establishment of a governmental agency for the sale of fuel, and the establishment of a like agency for the sale of other articles of daily use. The business of selling fuel can be conducted easily by individuals in competition. It does not require the exercise of any governmental function, as does the distribution of water, gas and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is not important that it should be conducted as a single large enterprise with supplies emanating from a single source, as is required for the economical management of the kinds of business last mentioned. It does not even call for the investment of a large capital, but it can be conducted profitably by a single individual of ordinary means.

We therefore have no hesitation in answering the first three questions in the negative."

The fourth question, shown above and relating to the extraordinary emergency, is of less importance to the determination in the case at bar, for it will be recalled that the proposed fuel yard in Portland is of a permanent character, whose establishment and maintenance is not induced by any emergency or unusual conditions. The conditions of the extraordinary emergency which were considered by the justices were "a scarcity of fuel and a pressing need thereof" and " a reasonable ground of belief that such a condition will occur in the near future." The Court continued:—

"It hardly can be contended that the remedy suggested by the question can have any effect upon the primary cause of all our troubles in this particular. That cause relates to sources of supply beyond the boundaries of this State. There is no reason to expect that any similar cause will arise within this State to affect such small sources of supply as exist here. If it is possible to conceive of the existence of such a cause arising hereafter in this Commonwealth, it can be dealt with effectually, not by the establishment of municipal yards for the sale of fuel at retail, but by some different kind of legislation which will make it impossible for either of two parties to a controversy like that which lately existed in a neighboring State, to refuse all proposals for an equitable determination of the rights of the parties, and thus to bring both to the verge of ruin, and to imperil the industries and to some extent the lives and health, of communities far away from the neighborhood of the conflict."

"Looking to the possible consequences of the emergency for which a remedy is desired, they can be divided into four classes: First, an increase of the number of those who fall into distress and are in need of relief from the public authorities, because they have no means to buy fuel at a greatly increased price. Secondly, increased expenditure, to their serious detriment, by those who have the means to buy. Thirdly, a possibility of a famine in fuel, such as to make it impossible reasonably to supply the needs of the community for comfortable living. Fourthly, a scarcity falling short of a famine but so great as to create widespread and general distress in the community which cannot be met by private enterprise.

"The first of these possible consequences does not call for legislation. Cities and towns now have ample power to provide in any reasonable way for paupers, whether it be by furnishing out-of-door relief or by support in almshouses, and whether their need of relief is permanent or caused by a temporary condition.

"It is equally true that the second of these consequences does not

justify taxation of those who do not have occasion to buy coal, for the benefit of those who do. The use of the money of taxpayers for such a purpose would not be a public use, but a use for the special pecuniary benefit of those who happen to be affected by the state of the coal market.

"The third possibility, that of an absolute famine in fuel because of the lack of a supply and the impossibility of obtaining a sufficient quantity reasonably to satisfy the needs of the community, would be a condition which would warrant the expenditure of the public money under appropriate legislation, if the legislature could discover a way through public agencies to supply the people. But it is difficult to see how the method referred to in the question could produce this result. If at any time there was an impossibility of obtaining supplies because the supplies were not here and could not be bought elsewhere, the opening of a city coal yard would furnish no relief. Such an establishment could not work a miracle of creation.

"In reference to an anticipated possible famine, the procurement and storage of a supply in time of plenty might be a remedy or an alleviation if the dread anticipation should become a reality, but the maintenance of a city fuel yard to conduct the business of buying and selling in a time of plenty, would have no tendency to avert a famine, or to relieve from its consequences if one should come. We are not called upon to consider whether the legislature would deem it advisable, if it has the power, to authorize cities and towns to build storehouses in which to keep large quantities of fuel in anticipation of a possible famine.

"In regard to the fourth of the possible consequence, a condition in which the supply of fuel would be so small, and the difficulty of obtaining it so great, that persons desiring to purchase it would be unabel to supply themselves through private enterprise, it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not. Under such circumstances we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for a public use.

"We do not think that we are expected to determine whether there might be any other conceivable emergency which could call for an affirmative answer to this question. Considering the question only in reference to the accompanying bills and the conditions to which we suppose it relates, our answer is in the negative, except in reference to the fourth of the above mentioned possible consequences. As to that, we are of opinion that if the supposed conditions exist in any city or town, it may be authorized, under proper legislation, to sell

fuel with the limitations above stated, so long as these conditions continue."

In addition to the opinion of a majority of the Court there appears at p. 611 the opinion of Mr. Justice Loring, who concurs in the answer given to the first three questions. In regard to the fourth question, which embraces the idea of the extraordinary emergency he says:

"Were Massachusetts a coal-producing State, it may well be that to prevent such a scarcity of fuel as is described in the supposed case the State could intervene by regulating the business of mining coal, or other similar action, and thereby get coal for its inhabitants.

"But where there is such a scarcity of coal that individual enterprise is not able to buy it, with all the powers which are attendant on organizations of individuals and with the foresight in buying before the event which prospective profits and a due consideration for their fellows would dictate, it is inconceivable that any coal could be got by cities or towns, which could be sold by them, if the course of action were taken which my brethren are of opinion is open to the Legislature to take.

"I understand that in the opinion of my brethren the authority cannot be given until the scarcity referred to has been found by the Legislature to exist, and that the Legislature cannot authorize a city or town to buy the fuel which it is to sell when the city or town is of opinion that the scarcity referred to exists or is likely to exist. In my opinion, such a remedy is purely theoretical, and for that reason should not be considered in answering the questions which have been submitted to us.

"Necessity is the only ground for justifying the government in entering upon the business enterprise of buying and selling coal; it is said that that necessity does not arise until it has been ascertained by the Legislature that the situation is so desperate that individual enterprise has failed to provide coal for the public to buy. Where the situation is so desperate, I cannot conceive how the interference of government, which is not to exercise any governmental function, can hope to be successful.

"In answer to the third possibility, my brethren have demonstrated that establishing a coal yard will not meet the necessity produced by a famine. The same argument applies to the remedy of the government's setting up a coal yard in case of the fourth possibility. The only other thing the government can do in that contingency is to pay the difference between the price which has to be paid to the dealers and the reasonable price which is within the means of some members of the public. Such a payment is not, in my opinion, a payment for a

public use, unless made in the exercise of the right to care for paupers.

"I concur with my brethren that, fuel being a necessity, the State can provide its inhabitants with it in case of a famine, in the exercise of the power which makes it its duty to take care of paupers. I also concur in their opinion that the State cannot authorize its cities or towns to go into the coal business because the price of fuel is likely to be high. Practically, the question must, in my opinion, be one of these two, and there is no middle course open.

"The fourth question, like the others, is 'propounded with a view to legislation upon the subjects therein mentioned, and in respect of divers bills and resolves pending before the General Court, copies whereof are hereby ordered to be transmitted herewith.' The bills and resolves transmitted with the question do not contemplate a famine in fuel or a reasonable apprehension of a famine in fuel. For that reason the fourth question does not call for the expression of an opinion upon what can be done by the State under the power of assisting paupers in case of a famine in fuel or an apprehension thereof. And answering the fourth question as it was put, I answer it in the negative."

In the *Opinion of Justices*, 1906, 190 Mass. 611, 613, the former opinions of the justices of that court in 155 Mass. 598 and in 182 Mass. 605 are both cited with approval to this statement: "The general principle that the people can be taxed in this commonwealth only for public purposes is established by many decisions," and adds, "The power of the legislature to appropriate money from the treasury of the commonwealth for any other than a public purpose is no greater than its power to authorize a city or town to make a like appropriation."

In *Wheelock* v. *City of Lowell*, 1907, 196 Mass. 220, 225, there was discussed the right of the city of Lowell to build a public hall. The Court said: "If the dominating motive for the erection of the hall is a strictly public use, then the expenditure for it is legal, although incidentally it may be devoted occasionally to uses which are not public. If, however, the project of the defendant city is merely colorable, masking under the pretext of a public purpose a general design to enter into the *private business* or maintain a public hall for gain, or devoting it mainly to any other than its public use as a gathering place for citizens generally, such an attempt would be a perversion of power and a nullity, and no public funds could be appropriated for it." And the Court cited as authority the *Opinion of Justices*, 182 Mass. 605.

*Opinion of Justices.* 1910, 204 Mass., 607.

The legislature invited the opinion of the Court whether it was within the constitutional power of the legislature to authorize the City of Boston to lay out a thoroughfare and take not only the land necessary for the same but also such quantities of land abutting thereon as might be reasonably necessary for the purposes of the commercial interests and general prosperity of the inhabitants, with a view to the subsequent use of the same by private individuals, assuming that the act provides for just compensation for all persons sustaining damage by such takings.

The justices quote from the opinion of that court in *Lowell* v. *Boston*, 111 Mass., 454, a case which involved the constitutionality of the statute authorizing the city to borrow money to be loaned to persons who suffered by the great fire of 1872, saying:

"The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity as justifying a tax, and not the magnitude of the interests to be affected, not the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefitted by their promotion."

The Justices continuing said:

HELD: "This question is presented upon the hypothesis that the desired facilities for the profitable use of the land can be secured only by the obliteration of the present lines of individual ownership along the street, the concentration through the power of eminent domain of those abutting estates in parcels of suitable size and shape, and the development of such parcels for warehouses, mercantile establishments and other buildings suited to the demand of trade and commerce. The question is whether such land can be taken with a view to the subsequent use of it by individuals under leases or conveyances from the city. The proposed legislation necessarily contemplates action by the city for no other purpose than to induce and promote the use of it by merchants or traders. It would contemplate a taking of

private property by right of eminent domain and an expenditure of money to pay for it and fit it for occupation. It is a rule of law universally recognized in this country that neither of these things can be done unless the taking or expenditure is for a public use. This has been stated so often and the principles on which it is founded have been considered so fully that it is unnecessary to consult it or to cite authorities.

"The only question about which there is a possibility of doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that the use of the property to obtain a business income or profit would not be a public use. The city cannot take the property of a private owner for such a purpose, nor can the city tax its inhabitants to obtain money for such a use. *It could as well tax them to raise money to carry on any other private business with the hope of gain. Such proceedings are entirely outside the functions of the state or of any subdivision of the state.*

HELD, that the question must be answered in the negative.

"An affirmative answer to this question would make it possible for the city to take the home of a resident near the line of a thoroughfare, or the shop of a humble tradesman, and compel him to give up his property and go elsewhere, for no other reason than that in the opinion of the authorities of the city some other use of the land would be more profitable, and therefore would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the right of eminent domain or the expenditure of public money has been justified on such grounds."

The justices continue: "This statement of the law is clear and accurate. It is governed by later decisions upon kindred questions in this commonwealth." Citing *Opinion of the Justices*, 155 Mass. 598.

*Opinion of Justices*, 1912, 211 Mass., 624.

HELD: That the proposed bill to empower the commonwealth to purchase, handle and sell land to provide homes for wage earners or improve the public health by providing homes in the more thinly populated areas of the state for those who otherwise might live in the more congested areas, is unconstitutional.

"The question is whether this is a public use, and to this fundamental test must be brought all governmental activity in every system based upon reason rather than force.

"The dominating design of the statute requiring the use of public funds must be the promotion of public interests and in the furtherance of the advantages of individuals. However beneficial in a gen-

eral or popular sense it may be that private interests should prosper and thus incidentally serve the public, the expenditure of public money to this end is not justified. The question in its last analysis is one of taxation.

"Taxation is somewhat historical in its nature and can be most intelligently approached by comparison of those subjects which have been held to be a public use and those which have been held not to be a public use. It is not now open to question that the establishment and maintenance of water and sewerage system and electric light and gas plants are public usage. *They relate to commodities which are or have become universally necessary, and they cannot be procured by each individual or family acting separately, but require co-operation.* As a practical matter, provision for these necessities is monopolistic in character, and having due regard to the reasonable convenience of the public, there can be no competition respecting them. The permanent and exclusive use of portions of the public ways is essential to the effect of furnishing these necessities. Highways are public in their nature, and their construction and repair are legitimate public expenses."

At Page 628, commenting upon the former expressions of opinion of the Court in 155 Mass. 598 and in 182 Mass. 605 to the effect that it was beyond the power of the legislature to authorize cities and towns to engage in the business of furnishing coal or fuel to the public, the Court further says:

"The economic aspects of conducting business of this character through public instrumentalities are not for our consideration. Such a system is not possible under our constitution. The grounds upon which these opinions were founded are that such enterprises are conducted by individuals. They are universally recognized as legitimate and proper fields for private and personal adventure. No legislative authority is required to engage in them, and no powers derived from that source are needed for their prosecution. It is a natural right subject only to regulation by the police power. A person lawfully engaged in such business cannot be driven out by taxation to support his rival, even though that rival be an arm of government."

Page 628: "Experiments in other lands, where the people have established either no bounds or fragile ones to the absolutism of governmental powers by a written constitution, afford no guide in the determination of what our constitution permits."

In Pond on Public Utilities, published in May, 1913, the author quotes at length from the Opinion of the Justices in 182 Mass. 605 relating to municipal fuel plants and remarks that this case "fur-

nishes an excellent statement of this principle together with the reason upon which it is founded."

The highest court in the Commonwealth of Massachusetts has thus in the twenty years from 1892 to 1912 expressed itself on seven different occasions, in 1892, 1896, 1903, 1906, 1907, 1910 and 1912, and in each has adhered consistently to its opinion that it is unconstitutional for cities to engage in the business of selling fuel. Its opinion thus given in 155 Mass., 598, sup., has not been modified.

The Opinions of the Justices in Massachusetts to the effect that the establishment of municipal fuel plants is unconstitutional, are recognized as sound law by every text writer on the subject, and are questioned by none.

*Cooley Const. Lim.*, p. 696.
*Pond on Pub. Utilities*, §§58, 61.
*Judson on Taxation*, §350.
*Abbott on Pub. Securities*, §101.
*Nichols on Taxation in Mass.*, p. 49.
*Gray on Lim. of Taxing Power & Pub. Indebt.*, §246.

*Abbott on Public Securities*, 1913, §101, Note p. 213.

For a city to engage in a commercial enterprise, such as the buying or selling of coal, is not a use of public moneys for a public purpose.

The principle stated in the text (Sec. 101) is supported by universal and overwhelming weight of legal decision. There is no rule which is more firmly established, or for better reasons. No attempt is made to cite all the leading authorities.

In *Dangers of Municipal Trading*, by Robert P. Porter, 1907, p. 22, he says: "The Supreme Court of Massachusetts, in view of the above clause, has handed down four opinions adverse to the whole principle and policy of public trading. The point raised was whether a city or town in that state could, within its constitutional powers, buy and sell wood and coal for the benefit of its citizens. To the several forms in which this question was presented to the Court the answer was an emphatic and unconditional negative. The Court was divided on the question whether, in time of emergency, a municipality might be justified in buying fuel, Joseph-like, wholesale, and selling it retail, even though such trading might be outside its constitutional rights. Judge Loring, however, was not content to leave the matter open even to this extent; he filed an opinion to the effect that no emergency can make constitutional an unconstitutional

act. In Great Britain there is not even an emergency to justify such a proceeding. The ground the Court took for deciding generally against the proposition of municipal fuel-yards was that the Constitution did not contemplate empowering municipalities to raise money by taxation for commercial purposes. The line of argument sustains an obvious interpretation of the fundamental law, and would seem to apply with equal force to the municipal ownership and operation of street railways, gas-works, and nearly all forms of public works."

## 11. THEORY THAT THE USE OF PUBLIC HIGHWAYS IS A CRITERION OF PUBLIC PURPOSE.

In the consideration of these authorities it will have been observed that there is one principle in harmony with almost every decision. Whenever the purpose for which taxes are to be levied is one which requires the permanent use of the highways, by license or franchise from the municipality, it will be found that such a purpose is likely to be public. Such, for instance, are purposes requiring the establishment of pipes, poles or wires in the public highways. These are usually found to be public purposes. Railroads are highways of steel, it has been held, and consequently aiding in their construction has been held to be a public purpose.

On the other hand, ventures which require the use of the highways only as they may be used by any citizen, with his wagon, are usually found to be private purposes and not public within the meaning of the Constitution. The reason, appearing from time to time in the decisions, is that each citizen cannot well lay his pipes for water in the public highways, nor string his own wires for his electric light, that it is economy for the municipality to permit one system of water pipes and one line of poles for electricity. As a criterion this theory of the use of the public highways cannot of course be applied to the erection of schools, public buildings, education, charity, health or police, but it may be applied as a test to highways, bridges, railroads, waterworks, sewage, gas and electric lights, subways, public wharves, and to all kinds of mercantile business, and it is evident that this idea in some form has been in the minds of some of the courts and text writers.

It is permissible for the government to embark in the enterprise of furnishing the public with the necessities and conveniences of life whenever the exercise of a governmental function such as the exclusive use of a portion of the public street or the exercise of the power of eminent domain is required to carry on the enterprise.

*Nichols on Taxation in Mass.,* 1913, p. 49.

In the *Opinion of Justices,* 1892, 155 Mass. 598, 605, reference was made to a former opinion by the court in 1890, 150 Mass. 592, where the justices had advised that a municipal gas and electric plant furnishing light to inhabitants might be regarded as a public service. In discussing that question in 1892, the justices said: "It is impracticable that each individual should manufacture gas or electricity for himself, but this can best be done by some company

of the municipality for a considerable territory, and for the use of both the municipality itself and the inhabitants. Everybody who chooses within that territory cannot be permitted to manufacture and distribute gas or electricity for public use or the use of other persons as it is distributed by means of pipes or wires, and the number who properly can be permitted to lay pipes or wires in a given territory must be limited to one or at most a few persons or corporations. The pipes or wires must be laid in or over the public ways, or in or over land taken for the purpose, which may require the exercise of the right of eminent domain. These were some of the reasons why the subject seemed to the justices a proper one for municipal regulation and control, and to constitute a service which a municipality could be authorized to perform for itself and its inhabitants."

In *Opinion of Justices,* 1903, 182 Mass. 605, 608, the Court said: "The business of selling fuel can be conducted easily by individuals in competition. It does not require the exercise of any governmental functions, as does the distribution of water, gas and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is not important that it should be conducted as a single, large enterprise with supplies emanating from a single source, as is required for the economical management of the kinds of business last mentioned."

*State* v. *Toledo,* 1891, 48 Ohio State, 112.

The question is whether the city can operate and maintain gas works for supplying the city and citizens. It was held that it could.

At page 137 of the Opinion: "Heat being an agent or principle indispensable to the health, comfort and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish water. It is inquired, why do not municipalities also purchase coal mines, and issue their bonds therefore, and embark in the business of mining and selling coal to private consumers? An obvious reply is that coal and other fuel may be carried to the consumer by the ordinary channels of transportation and at comparative moderate expense, while in conveying natural gas streets must be opened, pipes laid, works erected, fixtures and machinery purchased, and other expenses incurred beyond the enterprise and capital of an individual."

It is the province of government to do for the community the things which the individual members of the community cannot do for themselves. It is not the province of government to do for the

community the things which the individual members may do for themselves. The erection of school houses and buildings for municipal purposes generally come within this principle and for that reason are recognized as public purposes. It would be practically impossible for each citizen to erect and maintain his own school. It is properly one of the functions of government to provide buildings for these purposes. As to those commodities such as water, gas and electricity, invariably distributed from a single source, the means of distribution being located in the public highways, here again the government may act more economically than its citizens, one system of distribution being more effective than a thousand small systems; and it would be, of course, impracticable for several thousand different distribution systems to occupy the streets of a city. We see no reason why this criterion may not be determinative of the kind of business in which a city may properly engage. A business, however, such as clothing, for instance, needs no permanent distribution system, a natural person may engage in it without license, and there is no advantage or economy in having a municipality conduct it. And what is true of the business of dealing in clothing is true also of the business of dealing in coal, wood, ice or any commodity not requiring special permanent and fixed use of the highways for purposes of distribution. In other words, this is a real reason why the municipality may properly manufacture or distribute for the use of itself and of its citizens water, electricity, gas and even heat, where the latter is to be conveyed by distribution systems fixed in the highways, but under our form of government there can be no other reason.

## 12. THE SUPREME JUDICIAL COURT HAS EQUITY JURISDICTION OF THIS QUESTION.

*R. S.* 1903, *ch.* 79 §6 *cl. XI*—When * * * cities * * * for a purpose not authorized by law vote to pledge their credit or to raise money by taxation or to exempt property therefrom or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purpose, the court shall have jurisdiction in equity on petition or application of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint.

*Knight* v. *Thomas*, 1900, 93 Me. 494, 501.
*Emery* v. *Sanford*, 1899, 92 Me. 525.
*Hubbard* v. *Woodsum*, 1895, 87 Me. 88.
*Dyar* v. *Farmington Village Corporation*, 1878, 70 Me. 515.
*Whitehouse Equity*, §118.

## 13. GENERALLY.

*Former President Taft on Popular Government*, p. 9:

"I know that the so-called individualistic theory of rights and duties has been attacked as not broad enough and that pressure is now being exerted to introduce into practical jurisprudence the view that class or collectivist rights and obligations should be more clearly recognized and enforced at the expense of the present so-called rights of the individual. I am not now considering this issue and am not intimating any opinion on it. Whatever the proper view, whether we should consider to preserve individualism intact, or qualify it by collectivist amendment, the ultimate purpose of government and its limitations must be conceded to be the same, the promotion of the happiness of the average individual and his progress, whether this be effected by exalting individual independence, or by giving more power to society to secure greater happiness to a greater number of individuals."

The government may do that which is best for the community insofar as it is a common burden. So with gas, water, light, heat, power and highways, because from the physical nature of things the municipality may do these things better than several individuals interested therein. But the municipality cannot deal in merchandise in a way superior to the method of individuals. In the case of private business there is no common burden to be borne, no common burden which the city may bear more easily than the individual. Each, the city and the individual, presumably buy merchandise from the manufacturer at the same price, the city maintains its store for the sale of these goods at no less expense than the individual, and thus far no common burden appears. The city now sells this merchandise, perhaps at cost, including in that cost the expense of distribution. The city makes and includes no profit in these transactions. It is not clear how by selling to its citizens at a price less than that customarily charged the city is "bearing a common burden." An incidental saving of money to such of its citizens as may deal to purchase is by no means the bearing by the city of a common burden.

If coal may be municipally bought and sold, then wearing apparel, groceries, household supplies, jewelry, books and all the merchandise displayed in stores from one end of the city to the other may be dealt in by the municipality and even sold without profit, competing with and underselling private dealers and undermining private business. Somewhere the line must be drawn. As dealers in various com-

dities are entitled to equal treatment by the city it is a direct and not impartial injury to the clothier if the city compete with him and undermine his business, if it leaves untouched dealers in other lines of commodities.

Mr. Justice Waite in *Munn* v. *Illinois*, 94 U. S. 77, said the Constitution authorized the establishment of laws requiring each citizen to so conduct himself and so use his own property as not unnecessarily to injure another's. "This," he continues, "is the very essence of government and has found expression in the maxim 'Sic utere tuo ut alienum non laedas'." It seems plain that for a city to take from a local dealer in pictures, for instance, taxes for the avowed purpose of enabling the city therewith to erect and operate a picture store, selling at cost (as in the case at bar), which will compete with and ultimately destroy the business of the local dealer, is no illustration of the way this maxim was intended to be worked out. It is the sphere of the state to see that its citizens so conduct their affairs that they shall not injure each other. A fortiori, it is the duty of the state to so conduct its own affairs that it by its own act will not injure the property of its citizens.

In *Dangers of Municipal Trading* by Robert P. Porter, 1907, Director of the Eleventh U. S. Census, at page 314, we find his conclusions upon the advisability of municipal trading stated as follows: "It is hoped that the foregoing review of the present meaning of municipal trading may afford the means of demarking simply and clearly the proper distinction between what might with advantage be subjected to municipal control and what ought to be left free for private traders. The main criterion in any particular case should be, Can the commodity or service be worked efficiently on competitive trading principles? If this can be done, there should be no hesitation about handing it over for private contract; for competition is the life of commercial progress, and monopoly—above all, municipal monopoly—its most dangerous enemy. Those industries which cannot so well be operated on competitive lines, such as tramways, gas, electric light and power supply, should be controlled, but not, in my opinion, operated, by the municipal authorities. This procedure, if wisely enforced, will give to the community its just share of all the benefits, both in revenue, in relief of taxation, and in reasonable and efficient service. It leaves the individual free to assume the financial responsibility and to reap equitable reward for management and operation."

In an address on the subject of "Democracy and Law" before the American Bar Asosciation, 1916, Hon. Lindley M. Garrison used

the following language:

"Side by side with these tendencies and actuated by the sa
causes is another development of the times. There has sprung u
belief in the efficacy of mere legislative enactments. It is a curi
confusion of thought which results in believing that law and laws
the same. It is literally true that in the making of laws there is
end. All of the ills to which mankind is heir are supposed to
remediable by the making of statutes. Whatever ails the individ
man or the community evokes an outcry for immediate legislat
consideration. Nothing is to be left to individual initiative, i
vidual discipline of character, or to public opinion sustaining
upright and the just and ostracizing and minimizing the effect
those who do otherwise. Laws by the hundred and laws by the th
sand are enacted affecting the citizens from the time of the rising
the sun to the going down of the same, and government intrudes
self into every activity of mankind. Again, I suppose it is ne
sary for me to say that I am not now considering whether it is
that this should be so, or whether it is unwise, but I am saying
am emphasizing that it is absolutely opposed to every fundame
conception which went into the making of our government. It
never intended that our central government should have any s
paternalistic participation in the daily life of man."

"That which has been utilized by way of argument or persua
to produce the present situation is capable of being extended to
limit so that it is proper to say that there now is no limit. Efficie
and the public welfare—these are the justifications of every n
exercise of governmental power. It is undoubtedly true that a
can more effectively do certain things than the individual citizen,
if it is his duty to do them he should be required to bear his
responsibility and not slough it off upon the municipal governme

"The will of the majority acting in violation of a constituti
principle can be and is just as much an exercise of sheer tyrann
the unrestrained will of a single tyrant. The very essence of re
sentative democracy as devised and designed for our governmen
the functioning of each unit within its own sphere."

## 14. CONCLUSION.

For the reasons herein stated it is submitted that the decision and decree of the State Court should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

EBEN WINTHROP FREEMAN,
*For Plaintiffs in Error.*

Supreme Court of the United States

OCTOBER TERM, 1915

No. [redacted]77

HENRY M. JONES, HERBERT PAYSON, HOWARD WINSLOW, ET AL,

*Plaintiffs in Error.*

*vs.*

THE CITY OF PORTLAND,

*Defendant in Error.*

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

# BRIEF FOR DEFENDANT IN ERROR.

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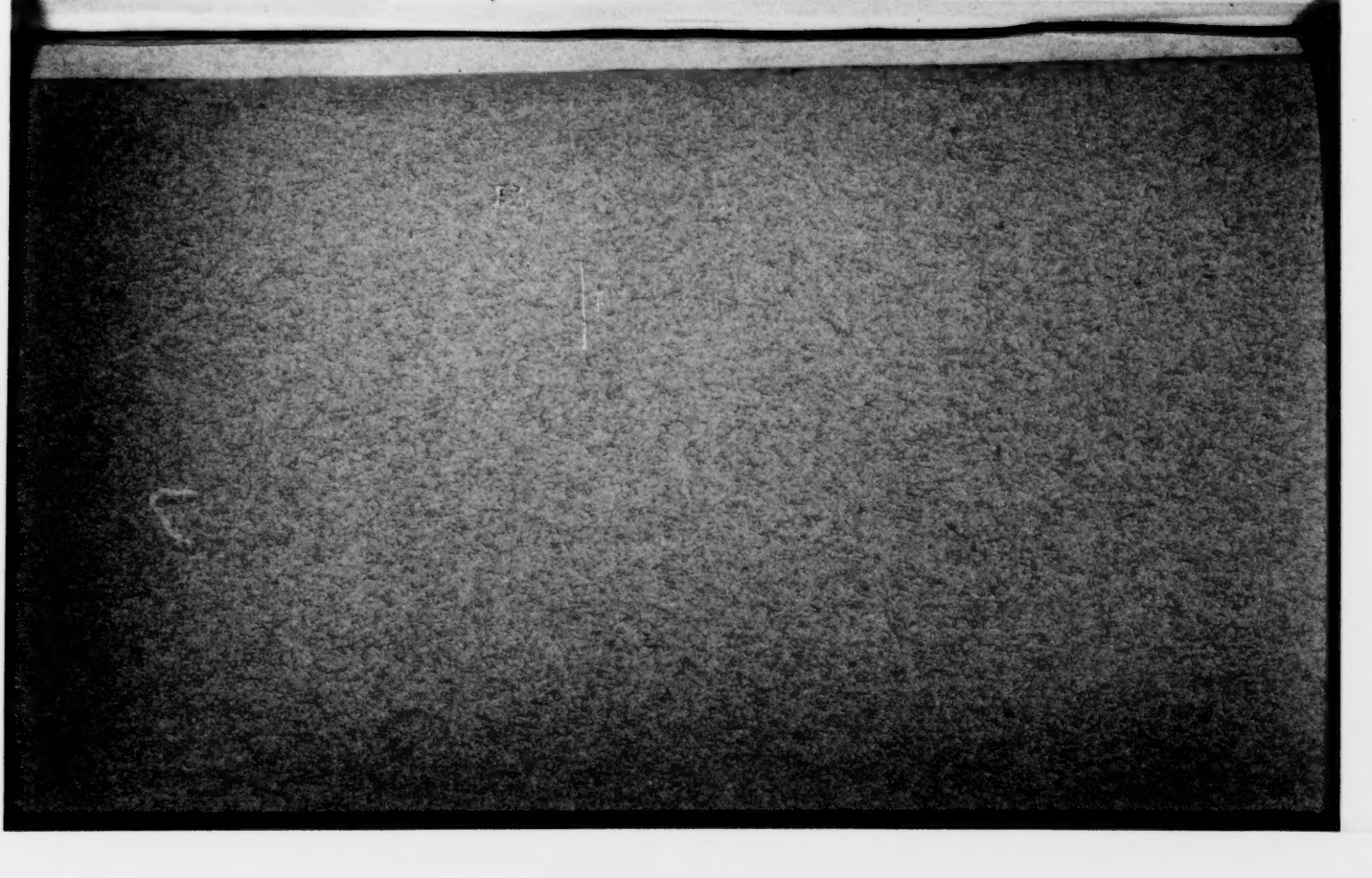

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# Supreme Court of the United States

## OCTOBER TERM, 1916

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**No. 336**

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HENRY M. JONES, HERBERT PAYSON, HOWARD WINSLOW, ET AL,

*Plaintiffs in Error.*

*vs.*

THE CITY OF PORTLAND,

*Defendant in Error.*

---

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

---

## BRIEF FOR DEFENDANT IN ERROR.

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### Statement of the Case.

Section 87 of Chapter 4 of the Revised Statutes of the State of Maine, which was enacted by the Legislature of the State in 1903, and duly approved, and which has not since been repealed or amended, provides that

"Any city or town is hereby authorized and empowered to establish and maintain within its limits, a permanent wood, coal and fuel yard, for the purpose of selling at cost, wood, coal and fuel to its inhabitants. The term 'at cost' as used herein, shall be construed as meaning without financial profit."

The City of Portland, located in the County of Cumberland and State of Maine, by votes of its City Council, duly passed and approved on February 4, 1913, voted to establish and maintain within its limitations a permanent coal and fuel yard for the purpose of selling at cost, wood, coal

and fuel to its inhabitants, and that the money necessary for such purpose be raised by taxation, and that the term "at cost" as used in said vote should be construed as meaning without financial profit, and appropriated the sum of one thousand dollars to be devoted to the establishment and maintenance of such fuel yard.

This statute, together with such proposed action of the City of Portland thereunder, were first considered by the Supreme Court of the State of Maine in the case of *Laughlin* v. *The City of Portland,* 111 Maine 486, which was a bill in equity brought by fifteen taxable inhabitants of the City of Portland, asking that the city be enjoined from establishing a municipal fuel yard, and from raising by taxation the money necessary for the purpose, and alleging that this statute and the proposed action of the city thereunder was in violation of the Constitution of Maine. The Court dismissed the bill, and sustained the constitutionality of the legislative act.

The plaintiffs in error in this case thereupon brought a second bill in equity in the Supreme Court of the State of Maine, praying that the City be enjoined from establishing a permanent municipal fuel yard, and alleging that this statute and the proposed action of the city thereunder were in violation of the provisions of Section One of the Fourteenth Article of Amendments to the Constitution of the United States.

This bill was considered upon demurrer by the Supreme Court of Maine in the case of *Jones* v. *The City of Portland,* 113 Maine 123, and the statute in question was held to be valid, and not in violation of the Fourteenth Article of Amendments to the Constitution of the United States, and the demurrer was sustained and the bill dismissed.

The correctness of that conclusion is the question for decision on this writ of error.

## SUMMARY OF ASSIGNMENTS OF ERRORS.

The plaintiffs in error have made and filed a general assignment of errors, alleging that the Supreme Judicial Court of the State of Maine erred in holding and deciding that section eighty-seven of chapter four of the Revised Statutes of the State of Maine was valid, and in holding and deciding that the authority exercised by said City of Portland under said section eighty-seven was valid, and have made and filed eighteen particular assignments of error, which, it is respectfully submitted, may be grouped and treated in the following manner.

The First particular assignment of error alleges that the Supreme Judicial Court of the State of Maine erred in sustaining the demurrer of the defendant in error, and in dismissing the bill.

The Second assignment of error presents the fundamental question of the entire matter, to wit, the question of a public use.

The Third, Fourth, Fifth and Sixth assignments of error may be grouped together, and, thus considered, they allege that the Supreme Judicial Court of the State of Maine erred in holding and deciding that taxation of the plaintiffs in error by the City of Portland, for the establishment and maintenance by said City of a permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants is valid; that such taxation does not abridge the privileges or immunities of the plaintiffs in error as citizens of the United States, and does not deprive the plaintiffs in error of property without due process of law, and that such taxation does not deny to the plaintiffs in error the equal protection of the laws, and is not in violation of the provisions of section one of

the Fourteenth Article of Amendments to the Constitution of the United States.

The Seventh, Eighth, Ninth and Tenth assignments of error allege the same errors as are set forth in the Third, Fourth, Fifth and Sixth assignments of error, except that they include the additional allegation, viz: "the appropriation by said city, for such establishment and maintenance, of money raised by taxation of the plaintiffs in error," and a reference, in the Tenth assignment, to the plaintiffs in error as "persons within the jurisdiction of the State of Maine."

The Eleventh, Twelfth, Thirteenth and Fourteenth assignments of error may be grouped together, and, thus considered, they allege that the Supreme Judicial Court of the State of Maine erred in holding and deciding that section eighty-seven of chapter four of the Revised Statutes of the State of Maine is valid; is not a law made by the State of Maine, or made and enforced by the State of Maine, in violation of the provisions of section one of the Fourteenth Article of Amendments to the Constitution of the United States; and is not a law made by the State of Maine, or made and enforced by the State of Maine, abridging the privileges or immunities of the plaintiffs in error as citizens of the United States.

The Fifteenth and Sixteenth assignments of error allege that the Supreme Judicial Court of the State of Maine erred in holding and deciding that by the enactment of said section eighty-seven by the Legislature of the State of Maine, and by the exercise by said City of its authority thereunder, the State of Maine is not depriving the plaintiffs in error of property without due process of law.

The Seventeenth and Eighteenth assignments of error, grouped together, allege that the Supreme Judicial Court

of the State of Maine erred in holding and deciding that by the enactment of said section eighty-seven, and by the exercise by the State of Maine, and by the exercise by said City of its authority thereunder, the State of Maine is not denying to the plaintiffs in error, as persons within its jurisdiction, the equal protection of the laws.

## PRINCIPAL QUESTION INVOLVED.

Under this Act of the Legislature of the State of Maine, all persons are treated alike under similar circumstances and conditions in respect both to the privileges conferred and the liabilities imposed. Equality of right is preserved. The legislation is uniform in its application, and does not discriminate. It is intended to carry out a public purpose limited in its application, to be sure, but it affects alike all persons similarly situated.

There is nothing in this statute or in any Act by a municipality thereunder, which will in any manner abridge the privileges or immunities of the plaintiffs in error as citizens of the United States, or deny to them as persons within the jurisdiction of the State of Maine the equal protection of the laws.

*Barbier* v. *Connolly,* 113 U. S. 27.

*County of Santa Clara* v. *Southern Pacific Ry. Co.,* 118 U. S. 396.

*Minneapolis Ry. Co.* v. *Beckwith,* 129 U. S. 26.

The defendant in error, therefore, respectfully submits that the only question presented by the several assignments of error which the Court need consider is whether or not the plaintiffs in error will be deprived of property without due process of law. This legislation contemplates the levying of a tax to defray the expense of establishing and maintaining municipal fuel yards, and if that be a public purpose or use, such taxation is valid.

The character of the use is therefore the fundamental question, and its importance in the determination of questions concerning the constitutional power of the Legislature to confer upon cities and towns authority to establish municipal fuel yards is well expressed in the *Opinions of the Justices,* 155 Mass. 598, page 601, in the following language:

"Whether the Legislature can authorize a city or town to buy coal and wood, and to sell them to its inhabitants for fuel, must be determined by considering whether the carrying on of such a business for the benefit of the inhabitants can be regarded as a public service. This inquiry underlies all the questions on which our opinion is required. If such a business is to be carried on, it must be with money raised by taxation. It is settled that the Legislature can authorize a city or town to tax its inhabitants only for public purposes. This is not only the law of the Commonwealth, but of the States generally and of the United States."

## PRESUMPTION OF CONSTITUTIONALITY.

It is a well established principle of law that the constitutionality of a legislative enactment is to be presumed until the contrary is shown beyond a reasonable doubt, and what is said by the Court in the case of *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, page 614, may well be taken as a concise expression of this principle:

"But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative

enactments must be resolved, if possible, in favor of the binding force of such enactments."

See also:

*Sweet* v. *Rechel,* 159 U. S. 380.

*Atchison, Topeka & Santa Fe R. Co.* v. *Matthews,* 174 U. S. 96.

## PUBLIC EXIGENCY OR NECESSITY.

The question of a public exigency is a question of fact, and, if the use is public, the determination by the Legislature that an exigency exists, and that a proposed law is necessary for the use, benefit and welfare of the public is final and conclusive. They are to determine the wisdom, propriety and necessity of a contemplated use, and whether or not the object in view will be accomplished by the means proposed.

The Supreme Court of Maine, in discussing the question of public exigency, says in *Allen* v. *Inhabitants of Jay,* 60 Maine 124, page 138:

"If the use or the exigency for which property is taken is public the determination of the legislature that the necessity of so taking it exists, is conclusive."

See also:

*Opinions of the Justices,* 58 Maine 590, page 619.

*Laughlin* v. *City of Portland,* 111 Maine 486, page 499.

The Supreme Court of Massachusetts in *Talbot* v. *Hudson,* 82 Mass. 417, says, on page 424:

"The legislature are the sole and exclusive judges whether the exigency exists which calls on them to exercise their authority to take private property."

See also:

*Lowell* v. *City of Boston,* 111 Mass. 454, page 463.

*Opinions of the Justices,* 155 Mass. 598, page 607.

This question was before this Court in *Livingston County* v. *Darlington*, 101 U. S. 407, and in the opinion it is stated, page 416:

"In the enactment of laws the Legislature must exercise its judgment and discretion. As to questions of pure policy and expediency, no express or necessarily implied constitutional provision intervening, it is the sole judge. It has also the undoubted right to take a comprehensive view in determining the necessity of a law, and the character of the purpose to be accomplished by it. A court, with any propriety, cannot arrogate to itself all power and wisdom in such matters; and if there be grave doubt as to the nature of the purpose, the doubt must always be solved in favor of the action of the Legislature."

The Legislature of the State of Maine, by its passage of Section eighty-seven of Chapter four of the Revised Statutes of Maine, determined that this legislation was necessary, that it would promote the public welfare and advance the prosperity of the people, and that a public exigency required it. This determination, it is submitted, must if the use be public, be taken as conclusive.

## WHAT IS A PUBLIC USE.

One principle in which all courts seem to agree is that the nature of the use, whether public or private, is ultimately a judicial question.

*Hairston* v. *Danville & Western Railway Co.*, 208 U. S. 598.

A public use must subserve some public interest or demand, and be available to all persons alike. It must be such a use as the public needs and requires for its welfare and prosperity, and which under existing conditions can best be provided by the government itself.

*Cooley on Constitutional Limitations*, Seventh Edition, page 768.

*Weismer* v. *Douglass*, 64 N. Y. 100.

*Sun Printing & Publishing Association* v. *New York*, 152 N. Y. 264.

*Gaylord* v. *Sanitary District of Chicago*, 204 Ill. 576.

*Opinions of the Justices*, 150 Mass. 597.

*Brown* v. *Gerald*, 100 Maine 372.

## PUBLIC USE DEPENDENT ON NEW CONDITIONS AND PROGRESS OF SOCIETY.

One of the requisites of a public use is that *existing conditions* demand it. These conditions may be of long standing, and well established by custom and usage. On the other hand, they may be new, arising from the advancement of society and the development and growth of new wants necessary for the comfort and welfare of the people, unknown and unnecessary in earlier times.

In the case of *Loan Association* v. *Topeka*, 20 Wallace (U. S.) 655, custom and the sanction of time were adopted as the guides in determining the character of a use.

But recent cases have asserted that no hard and fast rule can be laid down by which a public use may be measured, and that the term "public use" is a relative one and must be sufficiently elastic to cover the necessities that may result from new and changed conditions. They have governed themselves more by the needs of the public arising from new and changed conditions, than by an inflexible adherence to custom and the uses of society.

In the case of *State, Ex Rel Attorney General*, v. *City of Toledo*, 48 Ohio St. 112, the Court says,

"The establishment of natural-gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy; but in deciding whether in a given case the object for which taxes are assessed is a public or a private purpose we cannot leave out of view the

progress of society, the change of manners and customs and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power; and in deciding whether such taxes shall be levied for the new purposes that have arisen we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied."

See also:

*In Matter of Tuthill*, 36 App. Div. (N. Y.) 500.

*Holton* v. *Camilla*, 134 Ga. 560.

In *Judson on Taxation*, Sec. 346, it is said:

"The public opinion of one age or generation, however, as reflected in judicial opinions concerning the proper scope of governmental activity or as to what is the public purpose of taxation, is not the public opinion of another age or of another generation."

The Supreme Court of Maine in *Laughlin* v. *City of Portland*, 111 Maine 486, concurs in this modern doctrine in the following words, page 491:

"The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago, may, because of changed conditions, have ceased to be such to-day."

And on page 502, further says:

"Without discussing the question further it is sufficient to say that we see in this act of the Legislature a sign neither of paternalism nor of socialism. We do not regard it as a departure from previous legislation but in line with it, although perhaps one step further. The direction, however, is the same and the advance is caused by the development of a new want which has called for a new exercise of legislative power, not an exercise of new legislative power, and such an advance is both legitimate and commendable."

And cites *Olmstead* v. *Camp,* 33 Conn. 532, and *Sun Printing & Publishing Association* v. *New York,* 8 App. Div. 230.

## ESTABLISHMENT AND MAINTENANCE OF MUNICIPAL FUEL YARD IS A PUBLIC USE.

The establishment and maintenance of a municipal fuel yard under the authority and limitations of the statute in question, subserves a public demand for heat in the colder latitudes where the people need and require heat for their welfare and prosperity, and is, to this extent, within the accepted definition of a public use.

This statute authorizes the establishment of a "permanent wood, coal and fuel yard for the purpose of selling, at cost, wood, coal and fuel to its inhabitants," and provides that "the term 'at cost' " as used therein, shall be construed as meaning "without financial profit."

The words of the Act "selling . . . to its inhabitants" furnishes the guaranty of availability to all persons similarly situated without discrimination. Furthermore it cannot be successfully contended that this act permits a municipality to embark in a commercial enterprise. The sale must be without profit. Therefore the element of pecuniary gain is lacking.

"The purpose of the act is neither to embark in business for the sake of direct profits . . . nor for the sake of the indirect gains that may result to purchasers through reduction in price by governmental competition. It is simply to enable the citizens to be supplied with something which is a necessity, in its absolute sense, to the enjoyment of life and health, which could otherwise be obtained only with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole."

*Laughlin* v. *City of Portland,* 111 Me. 500.

Are the conditions in the State of Maine such that wood, coal and fuel can best be supplied by the government itself? We respectfully submit as an answer to this question, the words of the Court in *Laughlin* v. *Portland*, supra, page 499.

"In the case of fuel the practical difficulty is caused by the existence of monopolistic combinations. The mining, transportation, and distribution of coal, has, in the process of industrial development, fallen into the hands of these combinations to such an extent that the greater part of the supply is in the absolute control of a few. The difficulty and practical impossibility of obtaining an adequate supply for private needs at times in the past, and the consequent suffering among the people, especially in the more populous cities, are matters of history, and this difficulty may as well be caused by unreasonable prices as by shortage in quantity. All this is a matter of common knowledge and cannot be overlooked by the Court. The supply of water may be inadequate from one cause, that of fuel from another, but out of each arises the condition which renders the furnishing of it by the municipality a public use."

In Georgia, the furnishing of ice by a municipality was held in *Holton* v. *Camilla*, 134 Ga. 560, to be a public use, the Court saying:

"Is the difference between water in a liquid and in a frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has the right to furnish its inhabitants with water in a liquid form, we fail to see any reason why it cannot furnish it to them in a frozen condition."

It has been uniformly held that the construction and maintenance of a system of water works by municipalities, and the manufacture, sale and distribution by them of gas and electricity not only for lighting, but for heating, are public purposes.

*Gibbs Consolidated Gas Co.* v. *Baltimore*, 130 U. S. 393.

*State, Ex Rel. Attorney General,* v. *Toledo,* 48 Ohio St. 112.

*Opinions of the Justices,* 211 Mass. 624.

If the furnishing of heat generated by an electric current, or of heat produced by the combustion of gas is a public use, the one transmitted through wires *over* the highway, and the other conveyed through pipes *under* the highway, why then is not the furnishing of heat in the latent form of coal or wood by transportation *along* the highway equally a public use?

The means or method by which a commodity is furnished is a matter of expediency. It is an incident to the use, but does not determine its character.

*Opinions of the Justices,* 150 Mass. 595.

Coal and wood must be exposed to the action of fire or no heat results. Electricity does not produce heat without resistance. Gas must be ignited. Each is a potentiality capable of producing heat only when brought in contact with another agency. Wherein, then, from the standpoint of a public use, do they differ?

"I am of opinion that when money is taken to enable a public body to offer to the public without discrimination an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water, or gas, or electricity, or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets."

"I see no ground for denying the power of the Legislature to enact the laws mentioned in the questions proposed. The need or expediency of such Legislation is not for us to consider."

*Opinion of Mr. Justice Holmes* in 155 Mass. 607.

" 'The end of the institution, maintenance, and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural

rights and the blessings of life.' Without artificial heat, very few of our inhabitants would have the power of enjoying these rights and blessings. So far, and so far only, as it is a necessity of society as now organized, for the government to supply fuel in order to afford an environment which shall give this power, it is competent for the government to furnish or to provide for a supply."

*Opinion of Mr. Justice Barker* in 155 Mass. 607.

"The question is the question of the absence of heat to support life in this latitude without a re-adjustment of the means of heating now generally in use. Coal in cities and wood or coal in towns may be taken to be a necessity of existence at the present time."

*Opinion of Mr. Justice Loring* in 182 Mass. 611.

See also:

*Baker* v. *City of Grand Rapids,* 142 Mich. 687.

## RIGHT OF WAY IN STREETS NOT AN ELEMENT IN DETERMINING CHARACTER OF USE.

In Massachusetts, the question whether or not the distribution of a commodity requires the exercise of any governmental function involving the use of the public streets and the exercise of the right of eminent domain, apparently influenced the Court in its conclusion as expressed in *Opinions of the Justices,* 182 Mass. 605, and in *Opinions of the Justices,* 211 Mass. 624.

This theory that the use of the public highway is an essential element rather than an incident to some forms of public service, and that the exercise of public rights in making distribution is a prerequisite to a public use, is contradicted by the Supreme Court of Maine in *Laughlin* v. *City of Portland,* supra, the Court saying, page 495:

"Just here, however, the petitioners contend for a distinction between all these illustrations and the case at bar. They say that in the case of the distribution of water, and of light and

heat by gas or electricity, the use of the public highways is required for the mains and the poles and wires, that the purpose is public because it is necessary to obtain permission from public authorities, either state or municipal in order to carry it out. We grant that in those cases this element of public permission exists, but it does not follow that the converse is true and that no purpose is public where such permission does not exist. How can this criterion be applied to the erection of public buildings, the erection of a park, the building of a memorial hall, or of a market house, or the maintenance of a public clock? In other words under this rule, public service of this sort would be limited to one which can only be performed by a so-called public service corporation and not by an individual or corporation, independent of chartered rights. This is, in our judgment, too narrow. It makes an incident to some forms of public service an essential element. It transforms the method or means of rendering the service into the essence of the service itself. It makes the exercise of public rights in supplying the necessities of a community a prerequisite to the public use. But this exercise of public rights can itself be authorized only by the Legislature and if that branch of the government sees fit to bestow the public service in a manner that may obviate the use of the public right they certainly should have the right and the power so to do. It is a matter within their control."

And on page 496:

"Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and a simpler mode of distribution and, if the Legislature has the power to authorize municipalities to furnish heat to its inhabitants 'it can do this by any appropriate means which it may think expedient.' The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways but not if it can reach them by teams traveling along the identically

same highways. It will be something of a task to convince the ordinarily intelligent citizen that an act of the Legislature authorizing the former is constitutional but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the Legislature which is the only question before the court and not the wisdom of its exercise which is for the Legislature alone."

We therefore submit that the use of the public highway is not an essential element in determining the character of a use.

## PUBLIC USE A LOCAL QUESTION, AND JUDGMENT OF STATE COURT ON QUESTION OF PUBLIC USE ENTITLED TO RESPECT.

The people of the State of Maine, owing to the conditions existing in that State respecting the supply of fuel, decided that an exigency existed, and through their Legislature enacted the Statute in question. It is to be presumed that circumstances warranting this action by the Legislature did in fact exist; that evidence thereof was actually and properly before the legislative body, and that it acted with a full knowledge of the facts.

*Sweet* v. *Rechel*, 159 U. S. 380.

*Atchison, Topeka & Santa Fe R. Co.* v. *Matthews*, 174 U. S. 96.

The Supreme Court of the State of Maine, having especial and intimate knowledge of local conditions in that State respecting the supply of and demand for fuel, carefully considered the act of the Legislature authorizing the establishment and maintenance of fuel yards by municipalities, and declared, as the deliberate judgment of the highest court of that State, that the contemplated use was

public and not in violation either of the Constitution of the State or the Constitution of the United States.

*Laughlin* v. *City of Portland,* 111 Maine 486.
*Jones* v. *City of Portland,* 113 Maine 123.

This Court, recognizing that State courts are exceptionally familiar with peculiar local conditions which must be considered in determining the character of a proposed use, have uniformly accepted the judgment of the local courts, unless they were clearly without ground.

"For the sake of harmony and to avoid confusion, the Federal Courts will lean toward an agreement of views with the State Courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the Courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the State Courts."

*Burgess* v. *Seligman,* 107 U. S. 20, page 34.

"But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different States by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects, conditions vary so much in the States and Territories of the Union that different results might be expected.

"The propriety of keeping in view by this court, while enforcing the Fourteenth Amendment, the diversity of local conditions and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that State, is expressed, justified, and acted upon in *Fallbrook Irrigation District* v. *Bradley,* ub. sup., *Clark* v. *Nash,* ub. sup., and *Strickley* v. *Highland Boy Mining Co.,* ub. sup. What

was said in these cases need not be repeated here. *No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws.*

"We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of state courts on this subject, which so closely concerns the welfare of their people."

*Hairston* v. *Danville & Western Railway Co.*, 208 U. S. 598, pages 606, and 607.

See also:

*Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, 233 U. S. 211.

*O'Neill* v. *Leamer*, 239 U. S. 244.

*Loan Association* v. *Topeka*, 20 Wallace (U. S.) 655, does not contradict the doctrine expressed in the previous cases relative to the respect accorded to the decisions of State Courts on questions of public use, for, as is said in *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, on page 155:

"The contrary has not been held in this court by the case of *Loan Association* v. *Topeka*, 20 Wall. 655. In that case a statute of Kansas was held invalid because by its provisions the property of the citizen under the guise of taxation would be taken in aid of a private enterprise, which was a perversion of the power of taxation. The case was brought in the United States Circuit Court for the District of Kansas, and was decided by that court in favor of the city. There had been no decision of the highest state court upon the question whether the act violated the constitution of Kansas, and consequently there was none to be followed by the Federal court upon that question."

Taxation and eminent domain rest substantially on the

same foundation, as each implies the taking of private property for the public use.

*Cooley on Constitutional Limitations,* 7th Edition, page 715.

The recognition and acceptance by this court of the judgments of local courts as to the character of a proposed use in a question of eminent domain furnish a sufficient precedent to justify this court in extending similar recognition to the judgment of the highest court of the State of Maine upon this analagous question of a taking by taxation.

## CONCLUSION.

In conclusion, it is respectfully submitted that no prejudicial error has been assigned and that the judgment of the state court should be affirmed.

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# JONES ET AL *v.* CITY OF PORTLAND.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

No. 77. Argued November 22, 1917.—Decided December 10, 1917.

Establishing and maintaining a public yard for the sale of wood, coal and other fuel, without financial profit, to the inhabitants of a municipality, *held*, a public purpose for which taxes may be levied without violating the Fourteenth Amendment.
Revised Statutes of Maine, 1903, c. 4, § 87, sustained.
113 Maine, 123, affirmed.

THE case is stated in the opinion.

*Mr. Eben Winthrop Freeman* for plaintiffs in error:

The legislature may not make a use public by declaring it such. *Brown* v. *Gerald*, 100 Maine, 251, 373; *Lawton* v. *Steele*, 152 U. S. 133; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 159; *Allen* v. *Jay*, 60 Maine, 124, 136. The business of selling fuel is essentially private and taxes laid to support it are unconstitutional. *Citizens' Savings Loan Assn.* v. *Topeka*, 20 Wall. 655; *State* v. *Switzler*, 143

Missouri, 287; *Brooks* v. *Brooklyn*, 146 Iowa, 136; *Baker* v. *Grand Rapids*, 142 Michigan, 687; *Opinion of Justices*, 155 Massachusetts, 601; *Opinion of Justices*, 182 Massachusetts, 610; *Muller* v. *Thompson*, 149 Wisconsin, 488; *North Dakota* v. *Nelson County*, 1 N. Dak. 88; *Geneseo* v. *Gas Company*, 55 Kansas, 358; *Vail* v. *Attica*, 8 Kans. App. 668; *Keen* v. *Waycross*, 101 Georgia, 588; *Hayward* v. *Redcliff*, 20 Colorado, 33; *Mauldin* v. *Greenville*, 33 S. Car. 1; *Attorney General* v. *Detroit*, 150 Michigan, 310; *State* v. *Guilbert*, 56 Ohio St. 575; *Toledo* v. *Lynch*, 88 Ohio St. 71.

*Bussey* v. *Gilmore*, 3 Maine, 191, 197; *Opinion of Justices*, 58 Maine, 590; *Libby* v. *Portland*, 105 Maine, 370.

*Laughlin* v. *Portland*, 111 Maine, 486, is unsound.

The right of a municipality to establish and operate a municipal fuel plant was denied in *Opinion of Justices*, 155 Massachusetts, 598; *Prince* v. *Crocker*, 166 Massachusetts, 347, 361; *Opinion of Justices*, 182 Massachusetts, 605. See also *Opinion of Justices*, 190 Massachusetts, 611, 613; *Wheelock* v. *Lowell*, 196 Massachusetts, 220, 225; *Opinion of Justices*, 211 Massachusetts, 624.

It is permissible for the government to embark in the enterprise of furnishing the public with the necessities and conveniences of life whenever the exercise of a governmental function, as the exclusive use of a portion of the public street or the exercise of the power of eminent domain, is required to carry on the enterprise. *Opinion of Justices*, 155 Massachusetts, 598, 605; *Opinion of Justices*, 182 Massachusetts, 605, 608; *State* v. *Toledo*, 48 Ohio St. 112.

*Mr. Carroll S. Chaplin*, with whom *Mr. Guy H. Sturgis* and *Mr. Henry P. Frank* were on the brief, for defendant in error:

While custom and usage have been adopted as guides in determining whether a use is public or private (*Citizens'*

*Savings Loan Assn.* v. *Topeka*, 20 Wall. 655), recent cases have governed themselves more by the needs of the public arising from new and changed conditions. *State* v. *Toledo*, 48 Ohio St. 112; *Matter of Tuthill*, 36 App. Div. 500; *Holton* v. *Camilla*, 134 Georgia, 560; *Laughlin* v. *Portland*, 111 Maine, 486, 491, 502.

The establishment and maintenance of a municipal fuel yard is a public use. *Laughlin* v. *Portland, supra; Opinion of Justices*, 155 Massachusetts, 607; *Opinion of Justices*, 182 Massachusetts, 611; *Baker* v. *Grand Rapids*, 142 Michigan, 687. Likewise, the furnishing of ice. *Holton* v. *Camilla*, 134 Georgia, 560.

The operation of water works, and gas and electric systems for lighting and heating purposes, are public uses. *Gibbs Consolidated Gas Co.* v. *Baltimore*, 130 U. S. 393; *State* v. *Toledo, supra; Opinion of Justices*, 211 Massachusetts, 624. The means or method by which the commodity is furnished is a mere incident to the use, not determinative of its character. *Opinion of Justices*, 150 Massachusetts, 595. In *Opinion of Justices*, 182 Massachusetts, 605, and *Opinion of Justices*, 211 Massachusetts, 624, the conclusion of the court was influenced by the question whether or not the distribution of the commodity involved the use of the public streets and the exercise of eminent domain; but that question is immaterial. *Laughlin* v. *Portland*, 111 Maine, 486, 495, 496.

If the use be public, the legislative determination that a public exigency exists and that the proposed law is necessary is conclusive. *Allen* v. *Jay*, 60 Maine, 124, 138; *Opinion of Justices*, 58 Maine, 590, 619; *Laughlin* v. *Portland*, 111 Maine, 486, 499; *Talbot* v. *Hudson*, 82 Massachusetts, 417, 424; *Lowell* v. *Boston*, 111 Massachusetts, 454, 463; *Opinion of Justices*, 155 Massachusetts, 598, 607; *Livingston County* v. *Darlington*, 101 U. S. 407, 416.

It is to be presumed that the circumstances warranting the action of the legislature did in fact exist and that it

acted with full knowledge, and the judgment of the highest court of the State on the question of public use will be accepted by this court unless clearly without foundation.

MR. JUSTICE DAY delivered the opinion of the court.

By an act of the legislature of the State of Maine approved March 19, 1903, P. L. 1903, c. 122; § 87, c. 4, Revised Statutes of Maine, 1903, it was provided:

"Any city or town may establish and maintain, within its limits, a permanent wood, coal and fuel yard, for the purpose of selling, at cost, wood, coal and fuel to its inhabitants. The term 'at cost,' as used herein, shall be construed as meaning without financial profit."

The City of Portland, Maine, voted to establish and maintain within its limits a permanent coal and fuel yard for the purposes of selling at cost wood, coal and fuel to its inhabitants and that the money necessary for such purposes be raised by taxation, and that the term "at cost" as used in said vote should be construed as meaning without financial profit. On February 3, 1913, the common council of the city at a legal meeting passed the vote, and on the same date it was passed by the board of aldermen of the city, and on February 4, 1913, the mayor of the city approved it, whereupon it became the vote of the City of Portland. The city voted to appropriate the sum of one thousand dollars to be devoted to carrying out the purposes of the vote, and the appropriation was passed by the common council, the board of aldermen, and approved by the mayor of the city.

This suit was brought by citizens and taxpayers of Portland in the Supreme Judicial Court of Maine in equity to enjoin the establishment of the yard. The Supreme Judicial Court sustained a demurrer to the bill, and dismissed it. 113 Maine, 123. A writ of error brings the case here because of alleged violation of rights se-

cured to the plaintiffs in error by the Fourteenth Amendment. The contention is that the establishment of the municipal wood yard is not a public purpose, that taxation to accomplish that end amounts to the taking of the property of the plaintiffs in error without due process of law.

The decision of the case turns upon the answer to the question whether the taxation is for a public purpose. It is well settled that moneys for other than public purposes cannot be raised by taxation, and that exertion of the taxing power for merely private purposes is beyond the authority of the State. *Citizens' Saving & Loan Association* v. *Topeka*, 20 Wall. 655.

The act in question has the sanction of the legislative branch of the state government, the body primarily invested with authority to determine what laws are required in the public interest. That the purpose is a public one has been determined upon full consideration by the Supreme Judicial Court of the State upon the authority of a previous decision of that court. *Laughlin* v. *City of Portland*, 111 Maine, 486.

The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the State passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular State is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the State upon what should be deemed a public use in a particular State is entitled to the highest respect. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 607. In *Union Lime Co.*

v. *Chicago & Northwestern Ry. Co.*, 233 U. S. 211, this court declared that a decision of the highest court of the State declaring a use to be public in its nature would be accepted unless clearly not well founded, citing *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 160; *Clark* v. *Nash*, 198 U. S. 361, 369; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531; *Offield* v. *N. Y., N. H. & H. R. R. Co.*, 203 U. S. 372, 377; *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 607. This doctrine was reiterated in *O'Neill* v. *Leamer*, 239 U. S. 244, 253.

In the case of *Laughlin* v. *City of Portland*, 111 Maine, *supra*, the matter was fully considered by the Supreme Judicial Court of that State. After reviewing the cases which established the general authority of municipalities in the interest of the public health, convenience, and welfare to make provisions for supplying the inhabitants of such communities with water, light and heat by means adequate for that purpose, the court came to consider the distinction sought to be made between the cases which sustain the authority of the State to authorize municipal action for the purposes stated, and the one under consideration, because of the fact that in the instances in which municipal authority had been sustained the use of the public streets and highways for mains, poles and wires in the distribution of water, light and heat had been required under public authority, whereas in supplying fuel to consumers, under the terms of the law in question, no such permission was essential, the court said (111 Maine, 486, 496):

"Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal

itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and simpler mode of distribution and, if the Legislature has the power to authorize municipalities to furnish heat to its inhabitants 'it can do this by any appropriate means which it may think expedient.' The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways but not if it can reach them by teams travelling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the Legislature authorizing the former is constitutional but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the Legislature which is the only question before the court and not the wisdom of its exercise which is for the Legislature alone."

Answering the objection that sustaining the act in question opens the door to the exercise of municipal authority to conduct other lines of business and commercial activity to the destruction of private business, the court said (111 Maine, 500):

"But it is urged, why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store, or a meat market or a bakery. The answer has already been indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensible necessity of life, and more than this, the commodities mentioned are admittedly under present economic conditions regulated by competition in the ordinary channels of private

business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained as it is one of the main foundations of our prosperity and success. If the case at bar clearly violated that principle it would be our duty to pronounce the act unconstitutional, but in our opinion it does not. The element of commercial enterprise is entirely lacking. The purpose of the act is neither to embark in business for the sake of direct profits (the act provides that fuel shall be furnished at cost) nor for the sake of the indirect gains that may result to purchasers through reduction in price by governmental competition. It is simply to enable the citizens to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole."

Bearing in mind that it is not the function of this court under the authority of the Fourteenth Amendment to supervise the legislation of the States in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private.

The authority to furnish light and water by means of municipally owned plants has long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision for their establishment and operation. The right of a municipality to promote the health, comfort and convenience of its inhabitants by the establishment of a plant for the distribution of natural gas for heating purposes was sustained, and we think properly so, in *State of Ohio* v. *Toledo*, 48

Ohio St. 112. We see no reason why the State may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a State authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared by the highest court of the State to be a public one, the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States. As this view decides the questions open to consideration, it follows that the judgment of the Supreme Judicial Court of Maine must be affirmed.

*Affirmed.*